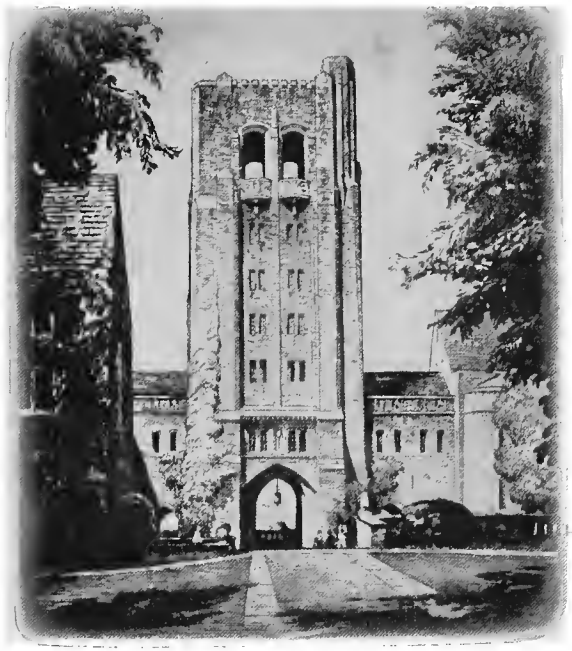

A SELECTION OF CASES

ON

THE LAW OF TORTS.

BY

JAMES BARR AMES AND JEREMIAH SMITH.

SECOND EDITION.

VOLUME II.

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PREFACE TO SECOND EDITION.

This edition differs from the first chiefly in these respects:

1. The following chapters in the first edition are omitted.

Chapter VI. Whether Negligence of Maker or Vendor of Chattel may make him Liable to Persons other than those contracting with him.

Chapter XII. Merger, or Suspension, of Civil Remedy in Case of Felony.

Chapter XIII. Whether Action lies at Common Law for causing Death.

Chapter XIV. Private Action for Damage caused by Public Nuisance.

Chapter XV. Immunity of Judicial Officers from Civil Actions.

Chapter XVII. Distinction between Tort and Breach of Contract.

Cases and notes bearing on the subjects of some of these chapters may be found here under other heads.

2. Three new chapters are added:

Chapter II. When Breach of Statutory Duty affords Basis for an Action of Tort.

Chapter VI. Proof of Negligence.

Chapter XI. Immunity of Landowner when his Rightful User of his Land (or the natural Condition of his Land) has resulted in Damage to his Neighbor.

3. The original chapter (Chapter III, first edition) on Negligence, Standard of Care and Degrees of Care is now divided into two chapters, and the first of these (on Negligence) is subdivided into eight sections. A new chapter is added on Proof of Negligence. The chapters on Contributory Negligence and Imputed Contributory Negligence are divided into sections. Upon all these subjects the book contains many cases not in the former edition.

4. On most topics additional cases are inserted, while some cases in the first edition are omitted and some others are abridged.

J. S.

August, 1909.

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CHAPTER I.

LEGAL CAUSE.

THE LORDS BAILIFF-JURATS OF ROMNEY MARSH *v.* THE CORPORATION OF THE TRINITY HOUSE.

1870. *Law Reports*, 5 *Exchequer*, 204.[1]

SPECIAL CASE stated in an action for negligence tried before Cockburn, C. J., at Maidstone, on the 10th of March, 1869, in which a verdict was found for the plaintiffs for £93, subject to the opinion of the Court on a special case.

The first count of the declaration charged the defendants with unskilful and negligent navigation of their ship by their servants, whereby the same was wrecked, and ran foul of and injured a sea wall of the plaintiffs'.

By their pleas the defendants traversed all the averments in the declaration.

The facts stated in the case were as follows. On the 30th of November, 1867, the defendants' pilot cutter *Queen*, through the negligence of her captain and crew, struck upon a shoal about three quarters of a mile out from the Dymchurch wall, a sea wall owned and repaired by the plaintiffs. It was then blowing hard, and there was a flood tide; and in consequence, after the vessel struck, the captain and crew lost all control over her, and she gradually drifted towards the shore, and was at last driven against the wall. If the weather had been moderate and the state of the tide different, this might have been prevented, but in the then state of the weather and tide it was impossible to prevent it. After the ship struck the ground, some of the crew escaped in a boat, and the captain and the rest of the crew were rescued from the cutter just before she struck the wall.

[1] Only so much of the case is here given as relates to the first count. The citations of counsel are omitted. — ED.

Sir G. Honyman, Q. C. (*Biron* with him), for the plaintiffs. Upon the first count the defendants are clearly liable. The vessel took the ground through negligence, and all that followed, though then inevitable, was as much the consequence of negligence as the injury done by a runaway horse would be if it was owing to the carelessness of his driver that he was allowed to get beyond control in the first instance.

Pollock, Q. C. (*Dixon* with him), for the defendants. As to the first point, it cannot be properly said that the defendants' negligence was the proximate cause of the injury. There intervened between their act of negligence and the alleged consequence a series of natural causes over which they had no control, and which could not be calculated on, such as the shifting of the wind, its violence, and the force of the tide as dependent upon it.

Sir G. Honyman, Q. C., in reply. As to the negligence, the whole was one continuous train of causation. *Cur. adv. vult.*

The judgment of the Court (Kelly, C. B., Martin, and Pigott, BB.) was delivered by

KELLY, C. B. The question in this case is whether the injury to the plaintiffs' wall was so caused by the negligence of the defendants as to make the defendants liable within the rule of law applicable to such cases.

The defendants' vessel, by the negligence of the captain and crew, grounded upon a shoal or sand-bank within three quarters of a mile of the wall of the plaintiffs', the immediate effect of which was that the vessel became unmanageable and beyond the control of the crew; and as at the time a high wind was blowing and the tide flowing towards the shore, the vessel was driven and carried with great violence against the wall, and so effected the injury in question.

The rule of law is, that negligence to render the defendants liable must be the *causa causans* or the proximate cause of the injury, and not merely a *causa sine qua non*.

I think that it was so in the present case. The immediate effect of the negligence was to put the vessel into such a condition that it must necessarily and inevitably be impelled in whatever direction the wind and tide were giving at the moment to the sea, and this was directly upon and towards the plaintiffs' wall. The case, therefore, appears to me to be the same as if the ship had been lying at anchor, with the tide flowing rapidly towards a rock, and the defendants had, by some negligence, broken the chain and set free the ship, in consequence of which it had at once and immediately been carried by the tide with great force and violence against the rock, and had become a wreck. Would not the wreck of the ship have been caused by the negligence which broke the chain? I think that it would, and that such a case and the case before the Court are the same; that the negligence of the crew, the servants of the defendants, was thus the immediate cause of

the ship being driven against the wall of the plaintiffs, and that the plaintiffs are therefore entitled to recover. My brother Pigott concurs in this judgment, and my Brother Martin, though entertaining some doubt upon the case, does not dissent.

Judgment for the plaintiffs.

Affirmed in Exchequer Chamber, 1872, L. R. 7 Exch. 247.

McDONALD *v.* SNELLING.

1867. 14 *Allen*, 290.[1]

Tort. The declaration was as follows: —

"And the plaintiff says that he was possessed and the owner of a certain sleigh and a certain horse which was harnessed to said sleigh, and the plaintiff was sitting and riding in said sleigh so harnessed, in a certain highway called Eliot Street, in said Boston, into and across Tremont Street; and one Thomas Baker on the same day was possessed of a certain sleigh, and also of a certain horse drawing the same through and along said Tremont Street towards and near said Eliot Street in said Boston. And whereas then on the same day the defendant was possessed of a certain sled or sleigh, and also of certain horses drawing the same through and along said Tremont Street, and the said defendant then and there, by a certain servant of him the said defendant, had the care, government and direction of the said sled or sleigh of the said defendant and defendant's said horses, yet the said defendant, not minding or regarding his duty in this behalf, then and there by his said servant so negligently and unskilfully managed and behaved himself in this behalf, and so ignorantly, carelessly and negligently drove and managed, guided and governed his said sled or sleigh and horses, that the said sleigh or sled of the said defendant, for want of good and sufficient care and management thereof, and of the horses then and there drawing the same as aforesaid, then and there struck against the said sleigh of the said Baker with such force and violence that the sleigh of the said Baker, wherein he was then sitting and riding as aforesaid, was broken to pieces, by means whereof the said horse of the said Baker was put to fright and ran with great violence, threw out said Baker, and escaping from him ran through and along said Tremont Street to said Eliot Street and into said Eliot Street, and upon, against and over the plaintiff, his said sleigh and horse, with such force and violence that the plaintiff's said sleigh wherein he was then and there sitting and riding as aforesaid was thereby broken to pieces and destroyed, and the plaintiff thrown with great violence from and out of his said sleigh, and his collar-bone

[1] Portions of this opinion are omitted; also the citations of counsel. — Ed.

broken, and otherwise greatly injured and bruised, and his life endangered, and the plaintiff's said horse was greatly damaged and spoiled. And the plaintiff used due care, and said Baker, his agents and servants, used due care, but said defendant, his agents and servants, did not use due care."

The defendant demurred to this declaration, assigning as causes of demurrer that there is no averment in the declaration that the injury to the plaintiff occurred by reason of or by means of the negligence of the defendant; and that it does not appear from the averments of the declaration that the alleged negligence of the defendant was the proximate cause of the injury to the plaintiff, sufficient in law to render the defendant liable in damages.

This demurrer was overruled in the superior court, and judgment ordered for the plaintiff; and the defendant appealed to this Court.

J. L. Stackpole, for defendant.

J. Nickerson, for plaintiff.

FOSTER, J. The question raised by this demurrer is, whether the injury received by the plaintiff was so remote from the negligent act of the defendant that the action cannot be sustained, although the plaintiff was injured without his own fault, and would not have been injured but for the fault of the defendant. How far at common law is one guilty of negligence responsible in damages for the consequences resulting from his neglect?

. . . . . .

Where a right or duty is created wholly by contract, it can only be enforced between the contracting parties. But where the defendant has violated a duty imposed upon him by the common law, it seems just and reasonable that he should be held liable to every person injured, whose injury is the natural and probable consequence of the misconduct. In our opinion this is the well established and ancient doctrine of the common law, and such a liability extends to consequential injuries, by whomsoever sustained, so long as they are of a character likely to follow, and which might reasonably have been anticipated as the natural and probable result under ordinary circumstances of the wrongful act. The damage is not too remote if according to the usual experience of mankind the result was to be expected. This is not an impracticable or unlimited sphere of accountability, extending indefinitely to all possible contingent consequences. An action can be maintained only where there is shown to be, first, a misfeasance or negligence in some particular as to which there was a duty towards the party injured or the community generally; and, secondly, where it is apparent that the harm to the person or property of another which has actually ensued was reasonably likely to ensue from the act or omission complained of.

. . . . . .

It is clear from numerous authorities that the mere circumstance that there have intervened, between the wrongful cause and the in-

jurious consequence, acts produced by the volition of animals or of human beings, does not necessarily make the result so remote that no action can be maintained.) The test is to be found, not in the number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequence. (So long as it affirmatively appears that the mischief is attributable to the negligence as a result which might reasonably have been foreseen as probable, the legal liability continues.)

There can be no doubt that the negligent management of horses in the public street of a city is so far a culpable act that any party injured thereby is entitled to redress. Whoever drives a horse in a thoroughfare owes the duty of due care to the community, or to all persons whom his negligence may expose to injury. Nor is it open to question that the master in such a case is responsible for the misconduct of his servant.

Applying these principles more closely to the facts set forth in this declaration and admitted by the demurrer, we find that by careless driving the defendant's sled was caused to strike against the sleigh of one Baker with such violence as to break it in pieces, throwing Baker out, frightening his horse, and causing the animal to escape from the control of its driver and to run violently along Tremont Street round a corner, near by, into Eliot Street where he ran over the plaintiff and his sleigh, breaking that in pieces and dashing him on the ground. Upon this statement, indisputably the defendant would be liable for the injuries received by Baker and his horse and sleigh. Why is he not also responsible for the mischief done by Baker's horse in its flight? If he had struck that animal with a whip and so made it run away, would he not be liable for an injury like the present? By the fault and direct agency of his servant the defendant started the horse in uncontrollable flight through the streets. As a natural consequence, it was obviously probable that the animal might run over and injure persons travelling in the vicinity. Every one can plainly see that the accident to the plaintiff was one very likely to ensue from the careless act. We are not therefore dealing with remote or unexpected consequences, not easily foreseen nor ordinarily likely to occur, and the plaintiff's case falls clearly within the rule already stated as to the liability of one guilty of negligence for the consequential damages resulting therefrom.

. . . . . .

It may not always be easy to determine whether any particular act of negligence is of such a character as to render the party guilty of it liable to third persons; or whether the ensuing consequences are so far natural and probable as to impose a liability for them in damages. Cases may be put falling very near the dividing line, and no rule can be laid down in advance which will determine all with precision. But the difficulty of applying a principle is a poor argument against its

validity, unless one more satisfactory can be proposed in its stead. There may be discrepancies and want of uniformity in the application of the principle to the facts of particular cases, but all the authorities cited concur in the support of the doctrine we have stated, and agree as to the rule by which the extent of liability for consequential damages resulting from negligence ought to be determined.

In the opinion of a majority of the Court, the demurrer in the present case must be overruled, because on the statements of the declaration the plaintiff's injury does not appear to be so remote from the negligence of the defendant as to exonerate the latter from liability. When such a question is raised by the pleadings or arises upon agreed or undisputed facts, it is matter of law; but where the evidence is contradictory, or the inferences to be drawn from it are uncertain, the jury must determine by a verdict whether the facts fall within the rule of law to be laid down on the subject. *Wilson* v. *Newport Dock Co.*, *ubi supra.*

Demurrer overruled.

SCOTT *v.* SHEPHERD.

13 *Geo.* III. 2 *Wm. Blackstone*, 892.

TRESPASS and assault for throwing, casting, and tossing a lighted squib at and against the plaintiff, and striking him therewith on the face, and so burning one of his eyes that he lost sight of it, whereby, &c. On not guilty pleaded, the cause came on to be tried before Nares, J., last summer assizes at Bridgwater, when the jury found a verdict for the plaintiff with £100 damages, subject to the opinion of the Court on this case. On the evening of the fair day at Milbourne Port, 28th October, 1770, the defendant threw a lighted squib, made of gunpowder, &c., from the street into the market-house, which is a covered building supported by arches, and inclosed at one end, but open at the other and both the sides, where a large concourse of people were assembled; which lighted squib, so thrown by the defendant, fell upon the standing of one Yates, who sold gingerbread, &c. That one Willis instantly, and to prevent injury to himself and the said wares of the said Yates, took up the said lighted squib from off the said standing, and threw it across the said market-house where it fell upon another standing there of one Ryal, who sold the same sort of wares; who instantly, and to save his own goods from being injured, took up the said lighted squib from off the said standing, and then threw it to another part of the said market-house, and in so throwing it struck the plaintiff, then in the said market-house, in the face therewith, and the combustible matter then bursting put out one of the plaintiff's eyes. *Qu.* If this action be maintainable?

This case was argued last term by Glyn for the plaintiff, and Burland for the defendant; and this term, the court being divided in their judgment, delivered their opinions *seriatim*.

NARES, J., was of opinion that trespass would lie well in the present case. That the natural and probable consequence of the act done by the defendant was injury to somebody, and therefore the act was illegal at common law. And the throwing of squibs has, by statute W. III., been since made a nuisance. Being, therefore, unlawful, the defendant was liable to answer for the consequences, be the injury mediate or immediate. 11 Hen. VII., 28, is express that *malus animus* is not necessary to constitute a trespass. So, too, 1 Stra. 596; Hob. 134; T. Jones, 205; 6 Edw. IV., 7, 8; Fitzh. Trespass, 110. The principle I go upon is what is laid down in *Reynolds* v. *Clarke*, Stra. 634, that if the act in the first instance be unlawful, trespass will lie. Wherever, therefore, an act is unlawful at first, trespass will lie for the consequences of it. So in 12 Hen. IV., trespass lay for stopping a sewer with earth, so as to overflow the plaintiff's land. In 26 Hen. VIII. 8, for going upon the plaintiff's land to take the boughs off which had fallen thereon in lopping. See also Hardr. 60; Reg. 108, 95; 6 Edw. IV., 7, 8; 1 Ld. Raym. 272; Hob. 180; Cro. Jac. 122, 43; F. N. B. 202, 91 G. I do not think it necessary, to maintain trespass, that the defendant should personally touch the plaintiff; if he does it by a mean it is sufficient. *Qui facit per aliud facit per se.* He is the person who, in the present case, gave the mischievous faculty to the squib. That mischievous faculty remained in it till the explosion. No new power of doing mischief was communicated to it by Willis or Ryal. It is like the case of a mad ox turned loose in a crowd. The person who turns him loose is answerable in trespass for whatever mischief he may do. The intermediate acts of Willis and Ryal will not purge the original tort in the defendant. But he who does the first wrong is answerable for all the consequential damages. So held in the *King* v. *Huggins*, 2 Lord Raym. 1574; *Parkhurst* v. *Foster*, 1 Lord Raym. 480; *Rosewell* v. *Prior*, 12 Mod. 639. And it was declared by this court, in *Slater* v. *Baker*, M. 8 Geo. III., 2 Wils. 359, that they would not look with eagle's eyes to see whether the evidence applies exactly or not to the case; but if the plaintiff has obtained a verdict for such damages as he deserves, they will establish it if possible.

BLACKSTONE, J., was of opinion that an action of trespass did not lie for Scott against Shepherd, upon this case. He took the settled distinction to be, that where the injury is immediate, an action of trespass will lie; where it is only consequential, it must be an action on the case: *Reynolds* v. *Clarke*, Lord Raym. 1401, Stra. 634; *Haward* v. *Bankes*, Burr. 1114; *Harker* v. *Birbeck*, Burr. 1159. The lawfulness or unlawfulness of the original act is not the criterion; though something of that sort is put into Lord Raymond's mouth in Stra. 635, where it can only mean, that if the act then in question, of erecting a spout,

had been in itself unlawful, trespass might have lain, but as it was a lawful act (upon the defendant's own ground), and the injury to the plaintiff only consequential, it must be an action on the case. But this cannot be the general rule; for it is held by the court in the same case, that if I throw a log of timber into the highway (which is an unlawful act), and another man tumbles over it, and is hurt, an action on the case only lies, it being a consequential damage; but if in throwing it I hit another man, he may bring trespass, because it is an immediate wrong. Trespass may sometimes lie for the consequences of a lawful act. If in lopping my own trees a bough accidentally falls on my neighbor's ground, and I go thereon to fetch it, trespass lies. This is the case cited from 6 Edw. IV., 7. But then the entry is of itself an immediate wrong. And case will sometimes lie for the consequence of an unlawful act. If by false imprisonment I have a special damage, as if I forfeit my recognizance thereby, I shall have an action on the case; per Powell, J., 11 Mod. 180. Yet here the original act was unlawful, and in the nature of trespass. So that lawful or unlawful is quite out of the case; the solid distinction is between direct or immediate injuries on the one hand, and mediate or consequential on the other. And trespass never lay for the latter. If this be so, the only question will be whether the injury which the plaintiff suffered was immediate or consequential only; and I hold it to be the latter. The original act was, as against Yates, a trespass; not as against Ryal or Scott. The tortious act was complete when the squib lay at rest upon Yates's stall. He, or any by-stander, had, I allow, a right to protect themselves by removing the squib, but should have taken care to do it in such a manner as not to endamage others. But Shepherd, I think, is not answerable in an action of trespass and assault for the mischief done by the squib in the new motion impressed upon it, and the new direction given it by either Willis or Ryal, who both were agents, and acted upon their own judgment. This differs it from the cases put of turning loose a wild beast or a madman. They are only instruments in the hand of the first agent. Nor is it like diverting the course of an enraged ox, or of a stone thrown, or an arrow glancing against a tree; because there the original motion, the *vis impressa*, is continued, though diverted. Here the instrument of mischief was at rest, till a new impetus and a new direction are given it, not once only, but by two successive rational agents. But it is said that the act is not complete, nor the squib at rest, till after it is spent or exploded. It certainly has a power of doing fresh mischief, and so has a stone that has been thrown against my windows, and now lies still. Yet if any person gives that stone a new motion, and does farther mischief with it, trespass will not lie for that against the original thrower. No doubt but Yates may maintain trespass against Shepherd. And, according to the doctrine contended for, so may Ryal and Scott. Three actions for one single act; nay, it may be extended *in infinitum*. If a man tosses a football into the street, and, after being kicked

about by one hundred people, it at last breaks a tradesman's window, shall he have trespass against the man who first produced it? Surely only against the man who gave it that mischievous direction. But it is said, if Scott has no action against Shepherd, against whom must he seek his remedy? I give no opinion whether case would lie against Shepherd for the consequential damage; though, as at present advised, I think, upon the circumstances, it would. But I think, in strictness of law, trespass would lie against Ryal, the immediate actor in this unhappy business. Both he and Willis have exceeded the bounds of self-defence, and not used sufficient circumspection in removing the danger from themselves. The throwing it across the market-house, instead of brushing it down, or throwing it out of the open sides into the street (if it was not meant to continue the sport, as it is called), was at least an unnecessary and incautious act. Not even menaces from others are sufficient to justify a trespass against a third person; much less a fear of danger to either his goods or his person, — nothing but inevitable necessity: *Weaver* v. *Ward*, Hob. 134; *Dickenson* v. *Watson*, T. Jones, 205; *Gilbert* v. *Stone*, Al. 35, Styl. 72. So in the case put by Bryan, J., and assented to by Littleton and Cheke, C. J., and relied on in Raym. 467, "If a man assaults me, so that I cannot avoid him, and if I lift up my staff to defend myself, and, in lifting it up, undesignedly hit another who is behind me, an action lies by that person against me; and yet I did a lawful act in endeavoring to defend myself." But none of these great lawyers ever thought that trespass would lie, by the person struck, against him who first assaulted the striker. The cases cited from the Register and Hardres are all of immediate acts, or the direct and inevitable effects of the defendant's immediate acts. And I admit that the defendant is answerable in trespass for all the direct and inevitable effects caused by his own immediate act. But what is his own immediate act? The throwing the squib to Yates's stall. Had Yates's goods been burnt, or his person injured, Shepherd must have been responsible in trespass. But he is not responsible for the acts of other men. The subsequent throwing across the market-house by Willis is neither the act of Shepherd, nor the inevitable effect of it; much less the subsequent throwing by Ryal. *Slater* v. *Barker* was first a motion for a new trial after verdict. In our case the verdict is suspended until the determination of the Court. And although after verdict the Court will not look with eagle's eyes to spy out a variance, yet when a question is put by the jury upon such a variance, and it is made the very point of the cause, the Court will not wink against the light, and say that evidence, which at most is only applicable to an action on the case, will maintain an action of trespass. 2. It was an action on the case that was brought, and the Court held the special case laid to be fully proved. So that the present question could not arise upon that action. 3. The same evidence that will maintain trespass may also frequently maintain case, but not *e converso*. Every action of a trespass with a "*per*

quod" includes an action on the case. I may bring trespass for the immediate injury and subjoin a "*per quod*" for the consequential damages; or may bring case for the consequential damages, and pass over the immediate injury, as in the case from 11 Mod. 180, before cited. But if I bring trespass for an immediate injury, and prove at most only a consquential damage, judgment must be for the defendant: Gates and Bailey, Tr. Geo. III., 2 Wils. 313. It is said by Lord Raymond, and very justly, in *Reynolds* v. *Clarke*, "We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion." As I therefore think no immediate injury passed from the defendant to the plaintiff (and without such immediate injury no action of trespass can be maintained), I am of opinion that in this action judgment ought to be for the defendant.

GOULD, J., was of the same opinion with Nares, J., that this action was well maintainable. The whole difficulty lies in the form of the action, and not in the substance of the remedy. The line is very nice between case and trespass upon these occasions. I am persuaded there are many instances wherein both or either will lie. I agree with Brother Nares, that wherever a man does an unlawful act, he is answerable for all the consequences; and trespass will lie against him, if the consequence be in nature of trespass. But exclusive of this, I think the defendant may be considered in the same view as if he himself had personally thrown the squib in the plaintiff's face. The terror impressed upon Willis and Ryal excited self-defence, and deprived them of the power of recollection. What they did was therefore the inevitable consequence of the defendant's unlawful act. Had the squib been thrown into a coach full of company, the person throwing it out again would not have been answerable for the consequences. What Willis and Ryal did was by necessity, and the defendant imposed that necessity upon them. As to the case of the football, I think that if all the people assembled act in concert, they are all trespassers: 1, from the general mischievous intent; 2, from the obvious and natural consequences of such an act; which reasoning will equally apply to the case before us. And that actions of trespass will lie for the mischievous consequences of another's act, whether lawful or unlawful, appears from their being maintained for acts done in the plaintiff's own land: Hardr. 69; *Courtney* v. *Collet*, 1 Lord Raym. 272. I shall not go over again the ground which Brother Nares has relied on and explained, but concur in his opinion, that this action is supported by the evidence.

DE GREY, C. J. This case is one of those wherein the line drawn by the law between actions on the case and actions of trespass is very nice and delicate. Trespass is an injury accompanied with force, for which an action of trespass *vi et armis* lies against the person from whom it is received. The question here is, whether the injury received by the plaintiff arises from the force of the original act of the defendant, or from a new force by a third person. I agree with my

Brother Blackstone as to the principles he has laid down, but not in his application of those principles to the present case. The real question certainly does not turn upon the lawfulness or unlawfulness of the original act; for actions of trespass will lie for legal acts when they become trespassers by accident; as in the cases cited of cutting thorns, lopping of a tree, shooting at a mark, defending oneself by a stick which strikes another behind, &c. They may also not lie for the consequences even of illegal acts, as that of casting a log into the highway, &c. But the true question is, whether the injury is the direct and immediate act of the defendant; and I am of opinion that in this case it is. The throwing the squib was an act unlawful, and tending to affright the bystander. So far mischief was originally intended; not any particular mischief, but mischief indiscriminate and wanton. Whatever mischief therefore follows, he is the author of it, — *Egreditur personam*, as the phrase is in criminal cases. And though criminal cases are no rule for civil ones, yet in trespass I think there is an analogy. Every one who does an unlawful act is considered as the doer of all that follows; if done with a deliberate intent, the consequence may amount to murder; if incautiously, to manslaughter: Fost. 261. So, too, in 1 Ventr. 295, a person breaking a horse in Lincoln's Inn Fields hurt a man; held, that trespass lay; and 2 Lev. 172, that it need not be laid *scienter*. I look upon all that was done subsequently to the original throwing as a continuation of the first force and first act, which will continue till the squib was spent by bursting. And I think that any innocent person removing the danger from himself to another is justifiable; the blame lights upon the first thrower. The new direction and new force flow out of the first force, and are not a new trespass. The writ in the Register, 95, a, for trespass in maliciously cutting down a head of water, which thereupon flowed down to and overwhelmed another's pond, shows that the immediate act needs not be instantaneous, but that a chain of effects connected together will be sufficient. It has been urged that the intervention of a free agent will make a difference, but I do not consider Willis and Ryal as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation. On these reasons I concur with Brothers Gould and Nares, that the present action is maintainable. *Postea to the plaintiff.*

A voluntary or deliberate human being's act intervening between the defendant's wrong & the plaintiff's injury does not break the legal causal relation between the two.

Gunsley v. State 137 N.Y. 1
Laning v. Man. R.R. Co. 99 N.Y. 158

THIS was an action on the case against the defendant, a coach proprietor, for so negligently conducting the coach, that the plaintiff, an outside passenger, was obliged to jump off the coach, in consequence of which his leg was broken.

It appeared that soon after the coach had set off from an inn, the coupling rein broke, and one of the leaders being ungovernable, whilst the coach was on a descent, the coachman drew the coach to one side of the road, where it came in contact with some piles, one of which it broke, and afterwards the wheel was stopped by a post. Evidence was adduced to show that the coupling rein was defective, and that the breaking of the rein had rendered it necessary for the coachman to drive to the side of the road in order to stop the career of the horses. Some of the witnesses stated that the wheel was forced against the post with great violence; and one of the witnesses stated, that at that time the plaintiff, who had before been seated on the back part of the coach, was jerked forwards in consequence of the concussion, and that one of the wheels was elevated to the height of eighteen or twenty inches; but whether the plaintiff jumped off, or was jerked off, he could not say. A witness also said, "I should have jumped down had I been in his (the plaintiff's) place, as the best means of avoiding the danger." The coach was not overturned, but the plaintiff was immediately afterwards seen lying on the road with his leg broken, the bone having been protruded through the boot.

Upon this evidence, Lord Ellenborough was of opinion, that there was a case to go to the jury, and a considerable mass of evidence was then adduced, tending to show that there was no necessity for the plaintiff to jump off.

LORD ELLENBOROUGH in his address to the jury, said: This case
Qs 1. presents two questions for your consideration; first, whether the proprietor of the coach was guilty of any default in omitting to provide the safe and proper means of conveyance, and if you should be of that
2. opinion, the second question for your consideration will be, whether that default was conducive to the injury which the plaintiff has sustained; for if it was not so far conducive as to create such a reasonable degree of alarm and apprehension in the mind of the plaintiff, as rendered it necessary for him to jump down from the coach in order to avoid immediate danger, the action is not maintainable. To enable the plaintiff to sustain the action, it is not necessary that he should have been thrown off the coach; it is sufficient if he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at certain peril; if that position was occasioned by the default of the defendant, the

action may be supported. On the other hand, if the plaintiff's act resulted from a rash apprehension of danger, which did not exist, and the injury which he sustained is to be attributed to rashness and imprudence, he is not entitled to recover. The question is, whether he was placed in such a situation as to render what he did a prudent precaution, for the purpose of self-preservation. — His Lordship, after recapitulating the facts, and commenting upon them, and particularly on the circumstance of the rein being defective, added: If the defect in the rein was not the constituent cause of the injury, the plaintiff will not be entitled to your verdict. Therefore it is for your consideration, whether the plaintiff's act was the measure of an unreasonably alarmed mind, or such as a reasonable and prudent mind would have adopted. If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences; if, therefore, you should be of opinion, that the reins were defective, did this circumstance create a necessity for what he did, and did he use proper caution and prudence in extricating himself from the apparently impending peril. If you are of that opinion, then, since the original fault was in the proprietor, he is liable to the plaintiff for the injury which his misconduct has occasioned. This is the first case of the kind which I recollect to have occurred. A coach proprietor certainly is not to be responsible for the rashness and imprudence of a passenger; it must appear that there existed a reasonable cause for alarm.

The jury found a verdict for the plaintiff.

Garrow, A.-G., and *V. Lawes* for the plaintiff.

Topping, *Scarlett*, and *Espinasse* for the defendant.

WOOLLEY *v.* SCOVELL.

9 Geo. IV. 3 *Manning & Ryland*, 105.

Case for negligence in throwing a bag of wool from a lofty warehouse into a yard, whereby the wool fell upon the plaintiff, who was in the yard, and injured him. Plea, not guilty. At the trial before Lord Tenterden, C. J., at the sittings at Guildhall after last term,[1] the following facts appeared: The defendant was the occupier of a warehouse the windows of which opened into a yard. Having occasion to remove a bag of wool from an upper floor of the warehouse, the defendant, for the purpose of saving time and expense, directed his servants to throw the wool out of the window of the warehouse. Before the bag was dropped from the window, one of the defendant's servants called out to warn passengers. The plaintiff, who happened to be in the yard, looked up and saw the wool as it was thrust out of the window; he then ran across the yard, thinking, as he afterwards said, that he should have time to escape. The wool, however, fell

upon him, and he sustained a considerable injury. The learned Judge told the jury, that if they were of opinion that the plaintiff ran wantonly or carelessly into danger, they ought to find a verdict for the defendant; but that if they thought the plaintiff had lost his presence of mind by the act of the defendant, and in the confusion produced by the situation in which he found himself, had run into the danger, they ought to give their verdict for the plaintiff. The jury found a verdict for the plaintiff, damages £150.

Sir *J. Scarlett* now moved to set aside the verdict, on the ground of misdirection. The rule laid down by the learned Judge was very humane, but it is submitted that it was not founded in law. The law should not vary according to the nerves of parties. It is true that with respect to ships, the loss must be borne by the party who was first in the wrong; but there the other party has not the entire control over the motions of his vessel, which depend upon the winds and waves. [Bayley, J. You complain of that part of the direction in which the jury were told, that if the plaintiff was deprived of his presence of mind by the wrongful act of the defendant, he was entitled to their verdict; not that the facts of the case did not warrant such an inference.]

Lord Tenterden, C. J. The first fault was the throwing of the wool from the window instead of lowering it by the usual mode, by a crane. This, the defendant admitted, he did to save time.

Bayley, J. I think the direction was right. Whether the plaintiff was deprived of his presence of mind by the act of the defendant, was a question for the jury.

Littledale, J. I have no doubt whatever that the direction was right. It is not surprising that the plaintiff should have been alarmed, and should thereby have lost his self-possession; and this alarm was occasioned by the wrongful act of the defendant.

Rule refused.

SCHOULTZ *v.* ECKHARDT MANUFACTURING COMPANY.

1904. 112 *Louisiana*, 568.[1]

ACTION by a foreman in defendant's sash and door factory for damage suffered during his work. Plaintiff was attempting to mend a belt under a saw table, and four of his fingers were cut off by his hand striking against the saw. He claimed that the harm was owing to negligence of the defendant. Besides other grounds of negligence charged against defendant, plaintiff alleged that the saw (when the belt gave way) was running at an excessive rate of speed. He also alleged that rubbish had been suffered to accumulate near the table, whereby access to the belt was cut off from the safe side of the table, and plaintiff was put under the necessity of doing the work from the dangerous side. In the District Court plaintiff had judgment, and defendant appealed.

Fenner, Henderson & Fenner, and *Chappuis & Holt*, for appellant.

Story & Pugh, for appellee.

PROVOSTY, J. [After stating the facts and plaintiff's grounds of complaint.] Plaintiff's argument on the first ground is that, if the speed of the machine had been less, the belt might have held out until a time when there might have been no rubbish to prevent his doing the work from the safe side, and that in that event he would have escaped injury. Here, in truth, is a string of conjectures. But assuming them all to be established facts, the simple legal answer is, that after the belt had given way, and thereby lost its connection with the machine, the speed of the machine ceased to be an element in the problem, and that therefore, as a cause of the injury, the breaking of the belt stands in the same relation to what followed as does any other antecedent conditional fact — as the fact, for instance, that plaintiff was born. Had the belt not broken at the time it did, there would have been at that time no belt to mend, and no injury; and so, had plaintiff never been born, there would have been no plaintiff, and no injury. One group of causes in the chain of causation culminated in the breaking of the belt. Another group was set in motion by the attempt to mend the belt. Juridically the two groups are entirely disconnected, and the law looks only to the latter — in other words, to the immediate or proximate cause. *Schwartz* v. *Railroad Co.*, 110 La. 534, 34 South. 667.

. . . . . .

If the rubbish was in plaintiff's way for repairing the machine with safety, he should have asked that it be removed, or should himself have had it removed. He had ample authority for the purpose. In fact, it was his duty to see to the removal of this rubbish if it stood in anybody's way.

The judgment appealed from is set aside, and the suit of plaintiff is dismissed, with costs in both courts.

[1] Statement abridged. Only part of case is given.—ED.

GILMAN v. NOYES.

1876. 57 *New Hampshire*, 627.[1]

From Coös Circuit Court.

Action on the case, for carelessly leaving the plaintiff's bars down, whereby his cattle and sheep escaped, and he was compelled to expend, and did expend, time and money in hunting for the same, and his sheep were wholly lost.

The evidence tended to show that the defendant, in looking after his own cattle, left the plaintiff's bars down, and that certain sheep which the plaintiff was pasturing were wholly lost. The evidence tended to show that the sheep were destroyed by bears after they had escaped from the plaintiff's pasture. The defendant claimed that the damages were too remote, and that they were not the natural consequences of the alleged careless acts of the defendant.

The defendant requested an instruction; that if the jury find that the sheep were killed by bears after their escape from the pasture, the plaintiff cannot recover, as the damages would be too remote.

This request the Court denied; but did instruct the jury, among other things, that if the defendant left the plaintiff's bars down, and the sheep escaped in consequence of the bars being left down by the defendant, and would not have been killed but for the act of the defendant, he was liable for their value.

Verdict for plaintiff. Motion for new trial.

Dudley, and *Ray & Drew*, for plaintiff.

Aldrich & Shurtleff, and *Bingham*, for defendant.

Cushing, C. J. — [after deciding other questions]. It should have been left to the jury to determine whether the injury was one for which the defendant's fault was the proximate cause. The Court rightly refused to instruct the jury that the damage was too remote, because that was a matter for the jury to determine. I am not prepared, however, to hold, that the criterion, for determining whether the defendant's fault was the proximate cause of the damage, is, whether the damage would or would not have happened without the defendant's fault.

This matter of remote and proximate cause has been recently a good deal discussed in the case of fires occasioned by the negligent management of locomotives. Where the fire has spread from point to point and from building to building, the question to what extent the negligence was the proximate cause has been held to be for the jury to determine. But in no one of those cases, whether the damage was held to be proximate or remote, could it have happened at all except for the negligence complained of.

[1] The statement of facts has been abridged. Only as much of the case is given as relates to the question of legal cause. — Ed.

I think the doctrine of the cases now is, that the question whether the damage is remote or proximate is a question of fact for the jury, and that the jury have to determine whether the damage is the natural consequence of the negligence, and such as might have been anticipated by the exercise of reasonable prudence. If the damage would not have happened without the intervention of some new cause, the operation of which could not have been reasonably anticipated, it would then be too remote. 2 Parsons on Contracts, 179; *State* v. *Manchester & Lawrence Railroad*, 52 N. H. 552, and cases there cited; *Fent* v. *Toledo, Peoria & Warsaw Railway Co.*, 59 Ill. 349 — s. c. 14 Am. R. 13.

In the present case it appears that the evidence tended to show the intervention of such new cause, — viz., bears, — and it would have been for the jury to say whether it was natural and reasonable to expect that if the sheep were suffered to escape they would be destroyed in that way.

If these views are correct, the verdict must be set aside, and a new trial granted.

SMITH, J. I concur in the foregoing conclusions of the chief-justice, and for the reasons given by him. The principal question in this case has been much discussed in the English and American courts, though but little in this State. The rule, that the plaintiff can recover only when the defendant's act or negligence was the proximate cause of the injury, is one of universal application; but the difficulty lies in determining when the cause is proximate and when remote. It is a mixed question of law and of fact, to be submitted to the jury under proper instructions. We have recently held that it is always for the jury to say whether the damage sustained is what the defendant ought to have expected, in the exercise of reasonable care and discretion. *Stark* v *Lancaster*, 57 N. H. 88, and authorities cited; *McIntyre* v. *Plaisted*, 57 N. H. 606; — see, also, *State* v. *M. & L. R. R.*, 52 N. H. 552; *Cate* v. *Cate*, 50 N. H. 144; *Underhill* v. *Manchester*, 45 N. H. 218.

The rule, as thus laid down, is also given in substance in 2 Parsons on Contracts, 456, 2 Gr. Ev., sec. 256, and Sedgwick on Damages, 88. The numerous cases in which this question has been discussed are cited by the above authors. It would be an unnecessary labor to review them in detail.

In this case the evidence tended to show the intervention of a new cause of the destruction of the plaintiff's sheep after their escape from his pasture, which could not reasonably have been anticipated. The only practicable rule to be drawn from all the cases, for determining this case, it seems to me, is, to inquire whether the loss of the plaintiff's sheep by bears was an event which might reasonably have been anticipated from the defendant's act in leaving his bars down, under all the circumstances of this case. If it was a natural consequence which any reasonable person could have anticipated, then the defendant's act was the proximate cause. If, on the other hand, the bears

were a new agency, which could not reasonably have been anticipated, the loss of the sheep must be set down as a remote consequence, for which the defendant is not responsible.

The jury were instructed that if the sheep escaped in consequence of the bars being left down by the defendant, and would not have been killed but for this act of the defendant, he was liable. Under these instructions the jury could not inquire whether the destruction of the sheep by the bears was an event which might reasonably have been anticipated from the leaving of the bars down, and for this reason I agree that the verdict must be set aside.

LADD, J. I am unable to free my mind from considerable doubt as to the correctness of the ground upon which my brethren put the decision of this case.

The defendant requested the Court to charge that, if the jury found that the sheep were killed by bears after their escape, the damages would be too remote. This the Court declined to do, but did instruct them that if the sheep escaped in consequence of the bars being left down by the defendant, and would not have been killed but for that act of the defendant, he was liable for their value. Both the request and the instruction went upon the ground that the question of remoteness — all the facts being found — was for the Court, and not for the jury. Upon that distinct and simple question the defendant claimed one way and the Court held the other. I understand it to be the opinion of my brethren that neither was right; that the question of remoteness was for the jury, and that the Court erred in not so treating it. Whether it is for the jury or the Court, every one who has considered the matter will agree that it is almost always a troublesome question, and often one attended with profound intrinsic difficulty.

The verdict here settles (1) that the bars were left down by the defendant; (2) that the sheep escaped in consequence thereof; (3) that they would not otherwise have been killed. Was the defendant's act the proximate cause of the damage? Was it the cause in such sense that the law will take cognizance of it by holding the defendant liable to make reparation in damages? And is that question one for the Court, or for the jury, to decide? The sheep would not have been killed, the jury say, but for that act: does it follow that the damage was not too remote? Certainly, I think, it does not. That one event would not have happened but for the happening of some other, anterior in point of time, doubtless goes somewhat in the direction of establishing the relation of cause and effect between the two. But no rule of law as to remoteness can, as it seems to me, be based upon that one circumstance of relation alone, because the same thing may very likely be true with respect to many other antecedent events at the same time. The human powers are not sufficient to trace any event to all its causes, or to say that anything which happens would [not] have happened just as it did but for the happening of myriads of other things

more or less remote and apparently independent. The maxim of the schoolmen — *Causa causantis, causa est causati* — may be true, but it obviously leads into a labyrinth of refined and bewildering speculation whither the law cannot attempt to follow. This case furnishes an illustration. The jury say the sheep would not have been killed by bears but for their escape, and would not have escaped but for the bars being left down. But it is equally certain, without any finding of the jury, that they would not have been killed by bears if the bears had not been there to do the deed; and how many antecedent facts the presence of the bears may involve, each one of which bore a causative relation to the principal fact sufficiently intimate so that it may be said the latter would not have occurred but for the occurrence of the former, no man can say. Suppose the bears had been chased by a hunter, at any indefinite time before, whereby a direction was given to their wanderings which brought them into the neighborhood at this particular time; suppose they were repulsed the night before in an attack upon the bee-hives of some farmer in a distant settlement, and, to escape the stings of their vindictive pursuers, fled, with nothing but chance to direct their course, towards the spot where they met the sheep; suppose they were frightened that morning from their repast in a neighboring cornfield, and so brought to the place of the fatal encounter just at that particular point of time.

Obviously, the number of events in the history not only of those individual bears, but of their progenitors clear back to the pair that, in instinctive obedience to the divine command, went in unto Noah in the ark, of which it may be said, but for this the sheep would not have been killed, is simply without limit. So the conduct of the sheep, both before and after their escape, opens a field for speculation equally profound and equally fruitless. It is easy to imagine a vast variety of circumstances, without which they would not have made their escape just at the time they did though the bars were down, or, having escaped, would not have taken the direction to bring them into the way of the bears just in season to be destroyed, as they were. Such a sea of speculation has neither shores nor bottom, and no such test can be adopted in drawing the uncertain line between consequences that are actionable and those which are not.

Some aid in dealing with this question of remoteness in particular cases is furnished by Lord Bacon's rule, *In jure causa proxima, non remota spectatur*, and other formulas of a like description, because they suggest some boundaries, though indistinct, to a wilderness that otherwise, and perhaps in the nature of things, has no limit.

Where damages are claimed for the breach of a contract, it has been said that the nearest application of anything like a fixed rule is, that the injury for which compensation is asked should be one that may be fairly taken to have been contemplated by the parties as the possible result of the breach of contract. Cockburn, C. J., in *Hobbs* v. *London & S. W. Railway Co.*, L. R. 10 Q. B. 117. In tort, they must

be the legal and natural consequence of the wrongful act. Sedgwick on Damages, 82, and cases cited; 2 Gr. Ev., secs. 252-256, and cases cited. But an examination of the numerous cases where this matter has been carefully and learnedly discussed, shows that the intrinsic difficulties of the subject are not removed, although they may be aided, by the application of such rules.

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The question is, whether Courts can relieve themselves from troublesome inquiries of this description by handing them over to the jury for determination. I am not now prepared to admit that they can. In this case, as we have seen, the verdict settles that the defendant left the bars down, that the sheep escaped in consequence, and that they would not have been killed but for their escape. Clearly, no disputed fact is left unsettled. The only question left open is, whether the damage is within or without the line drawn by the law as the boundary between those injuries for which the law compels compensation to be made and those for which it does not.

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Of course, all matters of fact, with respect to the causative relation that exists between the act complained of and the injurious consequences for which damages are sought, must be found by the jury, — and so, in one sense, it may be said that the question of remoteness is for the jury, under proper instructions by the Court; — but my doubt is, whether proper instructions by the Court should not contain specific direction as to whether any given fact of injury, if found proved, would or would not, with respect to the alleged cause, occupy the position of remoteness beyond the actionable degree.

In the present case, if all the facts found by the jury had been well pleaded in the declaration, and there were a demurrer, would it not be the duty of the Court to say whether the action could be maintained?

There are a few American cases which seem to give countenance to the view upon which this case has been decided by the Court. *Fairbanks* v. *Kerr*, 70 Pa. St. 86, *Saxton* v. *Bacon*, 31 Vt. 540, *Fent* v. *Toledo, Peoria & Warsaw Railway Co.*, 59 Ill. 349, are, perhaps, to be so regarded.

Should it be said that the question, whether a given consequence is one which might fairly be anticipated by one knowing the facts, is in its nature a question of fact, it must at the same time be admitted that it is a fact which lies rather in the region of conjecture than of evidence, and must be determined by an appeal to the experience and knowledge of human nature, and the natural sequence of cause and effect possessed by him who is to decide it, rather than by weighing testimony and balancing proofs, while it is at the same time pure matter of law whether a given act is prohibited, and pure matter of law and construction whether a remedy is given by the law, written or unwritten, for an injury sustained in consequence of such act. But, however the American cases referred to are to be understood, it seems to

me the great weight of authority is against the conclusion of the Court; for every case, where the simple question of remoteness has been determined by the Court, and the rule applied as a rule of law, would seem to be a direct authority the other way. Those cases are too numerous and too familiar to need citation.

The charge of the Court was in accordance with this view. The jury were required to find whether the act of the defendant in leaving the bars down was an event without which the loss would not have occurred; and then the Court undertook to apply a rule of law by saying that, if that particular relation of cause and effect did exist, the consequence was so near, so direct, and followed so naturally from the cause, that it must be regarded as a legal consequence for which the defendant should be held to make reparation in damages. I am not prepared to say that this was error.

As the case is disposed of upon different grounds, it is unnecessary to consider whether the holding of the Court upon this question of remoteness was right or not.

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According to the views of a majority of the Court, there was

A new trial granted.

GREEN-WHEELER SHOE COMPANY *v.* CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

1906. 130 *Iowa*, 123.[1]

APPEAL from Webster District Court.

Action to recover the value of two parcels of goods delivered by plaintiff to defendant at Fort Dodge, Iowa; one parcel to go to Boonville, Missouri, and the other to Chanute, Kansas; one of which it is alleged was lost, and the other damaged by defendant's negligence. The case was tried on an agreed statement of facts, and judgment was rendered for defendant. Plaintiff appeals. Reversed

Wright & Nugent, for appellant.

Carroll Wright, John I. Dille, and *Kenyon & O'Connor*, for appellee.

MCCLAIN, C. J. In the agreed statement on which the case was tried without other evidence being introduced, it is stipulated that the defendant was guilty of negligent delay in the forwarding of the goods of plaintiff from Ft. Dodge to Kansas City, where they were lost or injured on May 30, 1903, by a flood which was so unusual and extraordinary as to constitute an act of God, and that if there had been no such negligent delay the goods would not have been caught in the flood referred to or damaged thereby.

We have presented for our consideration, therefore, the simple question whether a carrier who by a negligent delay in transporting

[1] Only part of the opinion is given. — ED.

goods has subjected them, in the course of transportation, to a peril which has caused their damage or destruction, and for the consequence of which the carrier would not have been liable had there been no negligent delay intervening, is liable for the loss.)

On this question there is a well-recognized conflict in the authorities.[1]

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The real difficulty seems to be in determining to what extent, if at all, it is necessary that the negligent party must have been able to foresee and anticipate the result of his negligent act, in order to render him liable for the consequences thereof resulting from a concurrence of his negligence and another cause for which he is not responsible.

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Now, while it is true that defendant could not have anticipated this particular flood, and could not have foreseen that its negligent delay in transportation would subject the goods to such a danger, yet it is now apparent that such delay did subject the goods to the danger, and that but for the delay they would not have been destroyed; and defendant should have foreseen, as any reasonable person could foresee, that the negligent delay would extend the time during which the goods would be liable in the hands of the carrier to be overtaken by some such casualty, and would therefore increase the peril that the goods should be thus lost to the shipper. This consideration that the peril of accidental destruction is enhanced by the negligent extension of time during which the goods must remain in the carrier's control and out of the control of the owner, and during which some casualty may overtake them, has not, we think, been given sufficient consideration in the cases in which the carrier has been held not responsible for a loss for which he is not primarily liable, but which has overtaken the goods as a consequence of the preceding delay in their transportation.

It is not sufficient for the carrier to say by way of excuse that, while a proper and diligent transportation of the goods would have kept them free from the peril by which they were in fact lost, it might have subjected them to some other peril just as great. He cannot speculate on mere possibilities. A pertinent illustration is furnished by the well-settled rule with reference to deviation, which is that if the carrier transports the goods over some other route than that specified in the contract or reasonably within the contemplation of the parties, he must answer for any loss or damage occurring during such deviation, although it is from a cause which would not in itself render him liable.

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It is true that the analogy to the case of a deviation is denied by the courts which announce the rule of the Pennsylvania and Massachusetts cases, but the distinction attempted to be made, that a deviation amounts to a conversion rendering the carrier absolutely liable, is too technical to be considered as persuasive.

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Judgment reversed.

[1] Here the learned judge elaborately reviewed the authorities. — Ed.

RODGERS *v.* MISSOURI PACIFIC RAILWAY COMPANY.

1907. 75 *Kansas*, 222.[1]

ERROR from Marshall District Court.

W. W. Redmond, for plaintiff in error.

Waggener, Doster & Orr, for defendant in error.

BURCH, J. Plaintiff sued the railroad company for the value of a car-load of corn. The right to recover was predicated upon the defendant's negligence. The corn was delivered to the company at Frankfort, on May 22, 1903, for transportation and delivery to the plaintiff's agent at Kansas City, Mo. The loaded car stood on the track at Frankfort until May 28, when it was hauled to its destination, only to be overtaken and destroyed by the unprecedented flood of May 30, 1903. The delay was protracted through the negligent omission of the company to move the car. The flood was an act of God. The District Court rendered judgment for the defendant, and the plaintiff prosecutes error.

If the fundamental principles of legal liability for negligence are to be regarded, the judgment of the District Court is correct. The maxim is: "*In jure non remota causa, sed proxima, spectatur.*" If a carrier be guilty of negligence not in itself harmful, but wrongful only because of injurious consequences which may follow, and a new cause intervene between such negligence and the injury complained of, which new cause is not a consequence of the original negligence, which reasonable prudence on the part of the original wrongdoer could not have anticipated, and but for which the injury could not have happened, the new cause is the proximate cause and the original negligence is disregarded as not affecting the final result.

Carriers do not assume the risk of loss caused by the act of God.[2]

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It is scarcely worth while to debate further than these authorities have done the propriety of the rule that a carrier cannot be negligent, and therefore liable in damages, for omitting to take precautions against events which are beyond human foresight and which he does not cause. He is obliged to anticipate that delay in transportation may result in the deterioration of perishable freight, and that fluctuating markets may fall, but he cannot be charged with foreknowledge of floods like the one which devastated the railroad yards at Kansas City in 1903. He is under no duty to make provision against such phenomena. In the present case there is no causal relation between the negligence charged and the catastrophe which overtook the plaintiff's property. The carrier's delay did not produce the flood, and for all the carrier could foresee promptitude might have been as danger-

[1] A large part of the opinion is omitted. The learned judge cites many authorities, and much space is occupied by quotations from text-writers and reports. Most of the citations and quotations are not given here. — ED.

[2] A common carrier of goods "is answerable for all losses which do not fall within the excepted cases of the act of God (meaning inevitable accident, without the intervention of man), and public enemies." 2 Kent's Com. *597. — ED.

ous as delay. The delay was a mere incident to the destruction of the car of grain. The *causa causans* was the flood, the inevitableness of which could not be determined by anything which the carrier might do. As expressed by Mr. Justice Peters in the case of *O'Brien* v. *McGlinchy*, 68 Me. 552, 557, the negligence of the carrier had but a casual, while the flood had a causal, connection with the ultimate event.

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[As to *Davis* v. *Garrett*, 6 Bingham, 716], that case was one of deviation, a positive misfeasance, which makes the carrier liable as for conversion. 6 Cyc. 383; *Railway Co.* v *Dunlap*, 71 Kan. 67, 80 Pac. 34. Mr. Chief Justice Tindal bases his argument upon the proposition that the wrong of the master in taking the barge out of its proper course was undoubtedly a ground of action. The rule first appears in the law of marine insurance, and was adopted to meet the spirit of dangerous adventure on the part of sea-rovers which disregarded the safety of both property and life. Such a tort-feasor is held to take all risks, as if they were actually foreseen, and is not allowed to apportion or qualify his wrong.

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It has been decided that if a carrier undertake to transport freight in an unseaworthy ship, it makes no difference that the storm which foundered it was of unusual severity. Hazard existed when the voyage began, and it is not possible to determine the effect of the delinquency upon the final event. *Bell* v. *Reed*, 4 Binn. [Pa.] 127, 5 Am. Dec. 398. If baggage be put off in the rain without any protection, it makes no difference that the rainfall is unprecedented. It is the carrier's duty to protect property in its custody from exposure to rain *Sonneborn* v. *Southern Railway*, 65 S. C. 502, 44 S. E. 77. In all such cases, and in cases of actual deviation from the usual route, it is proper to say that an act of God must not combine with human instrumentality, that if a carrier depart from the line of duty he is liable, though an act of God intervene, and that he must be free from fault in order to claim his exemption. But to apply such statements to cases of mere delay in forwarding is to make the carrier liable, in the phrase of Mr. Chief Justice Gibson, for negligence in the abstract and not for the consequences of negligence. *Hart* v. *Allen and Grant*, 2 Watts [Pa.], 114.

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[After quoting from the opinion in *Green-Wheeler Shoe Co.* v. *Chicago, etc., R. Co., ante*], this principle either makes the carrier responsible upon its hindsight rather than its foresight, or makes it bound to regulate its conduct with reference to that which is utterly beyond mortal ken.

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[Quoting from ELLISON, J., in *Commission Co.* v. *R. R. Co.*, 113 Missouri Appeals, 544, pp. 547–548.]

"It might be negligence to delay putting certain goods under shelter in the month of July to protect them from rain or thieves; but if left out, and the unheard-of occurrence (in this climate) of a freeze at that season was to occur and destroy them, could there be any natural connection between the neglect and the loss? . . . If a train should for two hours be negligently delayed in leaving a station, and meantime a storm should arise and lightning strike a car and destroy property, the carrier would not be liable. The result would be beyond natural expectation, not within the thought or foresight of any one, altogether fortuitous and disconnected from the negligent act of delay.

"So, the rule may be stated to be this: the act of God must be the sole cause of the loss or injury; and whenever the negligence of the carrier mingles with the act of God as a coöperative cause, he is liable, provided the resulting loss is within the probable consequences of the negligent act; otherwise, it will be too remote and disconnected to be considered the proximate cause."

. . . . . .

This court is of the opinion that the negligent delay of a carrier in moving goods intrusted to it for transportation, not so unreasonable as to amount to a conversion, will not render it liable for the loss of such goods after they have been carried to their destination if they are there destroyed by an act of God before delivery.

. . . . . .

Judgment affirmed.

RYAN *v.* NEW YORK CENTRAL RAILROAD.

1866. 35 *New York*, 210.[1]

Chas. Andrews, for appellant.

S. T. Fairchild, for respondent.

HUNT, J. On the 15th day of July, 1854, in the city of Syracuse, the defendant, by the careless management, or through the insufficient condition, of one of its engines, set fire to its woodshed, and a large quantity of wood therein. The plaintiff's house, situated at a distance of one hundred and thirty feet from the shed, soon took fire from the heat and sparks, and was entirely consumed, notwithstanding diligent efforts were made to save it. A number of other houses were also burned by the spreading of the fire. The plaintiff brings this action to recover from the railroad company the value of his building thus destroyed. The judge at the Circuit nonsuited the plaintiff, and the General Term of the fifth district affirmed the judgment.

The question may be thus stated: A house in a populous city takes fire, through the negligence of the owner or his servant; the flames extend to and destroy an adjacent building: Is the owner of the first

[1] Portion of opinion omitted. — ED.

building liable to the second owner for the damage sustained by such burning?

It is a general principle that every person is liable for the consequences of his own acts. He is thus liable in damages for the proximate results of his own acts, but not for remote damages. It is not easy at all times to determine what are proximate and what are remote damages. . . . So if an engineer upon a steamboat or locomotive, in passing the house of A., so carelessly manages its machinery that the coals and sparks from its fires fall upon and consume the house of A., the railroad company or the steamboat proprietors are liable to pay the value of the property thus destroyed. *Field* v. *N. Y. Central R. R.*, 32 N. Y. 339. Thus far the law is settled and the principle is apparent. If, however, the fire communicates from the house of A. to that of B., and that is destroyed, is the negligent party liable for his loss? And if it spreads thence to the house of C., and thence to the house of D., and thence consecutively through the other houses, until it reaches and consumes the house of Z., is the party liable to pay the damages sustained by these twenty-four sufferers? The counsel for the plaintiff does not distinctly claim this, and I think it would not be seriously insisted that the sufferers could recover in such case Where, then, is the principle upon which A. recovers and Z. fails?

[After referring to a suggested distinction between an intentional firing and a negligent firing.] Without deciding upon the importance of this distinction, I prefer to place my opinion upon the ground that, in the one case, to wit, the destruction of the building upon which the sparks were thrown by the negligent act of the party sought to be charged, the result was to have been anticipated the moment the fire was communicated to the building; that its destruction was the ordinary and natural result of its being fired. (In the second, third, or twenty-fourth case, as supposed, the destruction of the building was not a natural and expected result of the first firing.) That a building upon which sparks and cinders fall should be destroyed or seriously injured must be expected, but that the fire should spread and other buildings be consumed, is not a necessary or an usual result. That it is possible, and that it is not unfrequent, cannot be denied. The result, however, depends, not upon any necessity of a further communication of the fire, but upon a concurrence of accidental circumstances, such as the degree of the heat, the state of the atmosphere, the condition and materials of the adjoining structures, and the direction of the wind. These are accidental and varying circumstances. The party has no control over them, and is not responsible for their effects.

My opinion, therefore, is, that this action cannot be sustained, for the reason that the damages incurred are not the immediate but the remote result of the negligence of the defendants. The immediate result was the destruction of their own wood and sheds; beyond that it was remote.

To sustain such a claim as the present, and to follow the same to its legitimate consequences, would subject to a liability against which no prudence could guard, and to meet which no private fortune would be adequate. Nearly all fires are caused by negligence, in its extended sense. In a country where wood, coal, gas, and oils are universally used, where men are crowded into cities and villages, where servants are employed, and where children find their home in all houses, it is impossible that the most vigilant prudence should guard against the occurrence of accidental or negligent fires. A man may insure his own house or his own furniture, but he cannot insure his neighbor's building or furniture, for the reason that he has no interest in them. To hold that the owner must not only meet his own loss by fire, but that he must guarantee the security of his neighbors on both sides, and to an unlimited extent, would be to create a liability which would be the destruction of all civilized society. No community could long exist, under the operation of such a principle. In a commercial country, each man, to some extent, runs the hazard of his neighbor's conduct, and each, by insurance against such hazards, is enabled to obtain a reasonable security against loss. To neglect such precaution, and to call upon his neighbor, on whose premises a fire originated, to indemnify him instead, would be to award a punishment quite beyond the offence committed. It is to be considered, also, that if the negligent party is liable to the owner of a remote building thus consumed, he would also be liable to the insurance companies who should pay losses to such remote owners. The principle of subrogation would entitle the companies to the benefit of every claim held by the party to whom a loss should be paid.

In deciding this case, I have examined the authorities cited from the Year Books, and have not overlooked the English statutes on the subject, or the English decisions extending back for many years. It will not be useful further to refer to these authorities, and it will be impossible to reconcile some of them with the view I have taken.

The remoteness of the damage, in my judgment, forms the true rule on which the question should be decided, and which prohibits a recovery by the plaintiff in this case.

Judgment should be affirmed.

HOYT *v.* JEFFERS.

1874. 30 *Michigan*, 181.[1]

Error to Saginaw Circuit.

The original action was brought by Jeffers against Hoyt, to recover damages for certain wooden buildings of Jeffers, alleged to have been burned by fire communicated from Hoyt's steam saw-mill, and which was so communicated by Hoyt's negligent management. Jeffers' buildings burned were, first, a hotel, situated about two hundred and thirty-three feet from the saw-mill, and on the other side of the street; second, a barn about five feet distant from the shed attached to the hotel; third, a wash-house about six feet from the barn. The jury returned a verdict for the plaintiff which presumably included damages for all the buildings.

John J. Wheeler and *Pond & Brown*, for plaintiff in error.

I. M. & H. P. Smith and *Gaylord & Hanchett*, for defendant in error.

Christiancy, J. [after stating the facts, and overruling other exceptions]. The only remaining exception which requires notice is to that portion of the charge in which the Court says to the jury, after fairly submitting the question of the burning of the Sherman House through defendant's negligence, "If you find as a fact that the fire passed from the building to the other property of the plaintiff upon the same lot, and immediately adjoining, without any other cause than simply the fire naturally burning and consuming the first building, you should give, in addition to the value of the first building, the value of the other buildings destroyed, situate there upon the property, with interest, the same as the other, from the time of its destruction." This charge must be understood with reference to the evidence, which showed that the woodshed of the house separated the barn from the house, that the barn was about five feet from the shed, and the wash-house about six feet from the barn, and all were of wood.

In view of the facts, the very statement of the proposition contended for by the plaintiff in error must, upon every sound principle, be held to carry with it its own refutation. As well might it be contended that, because the fire caught in a particular spot on the outside of the Sherman House, which was the only direct result of the negligent use of defendant's chimney, he could not be held for the burning of the inside of the house, or any portion of the outside which caught only by the spread of the fire first kindled by the sparks.

If we are to refine upon questions of this kind, in defiance of practical common sense, the defendant's liability might just as well, upon strict scientific principles, be confined to still narrower limits. The argument is, that, though defendant may be liable for the loss of the par-

[1] The statement of facts has been condensed, and several points omitted. — Ed.

ticular building first set on fire through his negligence, and such others as are in actual contact with it, yet his liability cannot be extended to others not in such actual contact, or where there is an intervening space, however small, between them. Now, it is so well settled as to be treated almost as an axiom in natural philosophy, that no two particles of matter actually touch each other, and that there is always an intervening space between them. The defendant's liability must, therefore, be confined to the particular particle or particles of matter which actually first caught fire, and the whole conflagration resulting, not only of the remainder of the particular board or shingle, but of the house, must be treated as a new consequential injury too remote to serve as a safe ground of damages.

This, it may be said, is unreasonable, and ludicrously absurd; and so it is; but it is slightly more absurd or ludicrous than it would be to hold that defendant's liability must be limited to the first building burned, because the others were not a part of it, or in actual contact with it, but five or six feet distant. If such other buildings are satisfactorily shown to have been actually burned by the fire of the Sherman House, caused by the negligence of the defendant, and especially if this was, under the circumstances, the natural and probable, as well as the actual result of the fire so caused, and without any contributory negligence of the plaintiff, I can see no sound principle which can make the defendant's liability turn upon the question whether the buildings thus burned by the fire of the first, were five, six, or fifty feet, or the one-hundredth part of an inch from it.

And though a building thus burned by the fire of the first might be at such a distance that its taking fire from the first might not, *a priori*, have seemed possible, yet if it be satisfactorily shown that it did, in fact, thus take fire, without any negligence of the owner, and without the fault of some third party, which could properly be recognized as the proximate cause, and for which he could be held liable, the principle of justice or sound logic, if there be any, is very obscure, which can exempt the party through whose negligence the first building was burned, from equal liability for the burning of the second. If it be said that this extent of liability might prove ruinous to the party through whose negligence the buildings were burned, it may be said, in reply, that, under such circumstances, it is better, and more in accordance with the relative rights of others, that he should be ruined by his negligence, than that he should be allowed to ruin others who are innocent of all negligence or wrong.

I see no error in the record, and the judgment should be affirmed, with costs.

LAWRENCE, J., IN FENT *v.* TOLEDO, &c. RAILWAY COMPANY.

1871. 59 *Illinois*, 357–358, 359–362.

WE now come to the two cases chiefly relied upon by appellee's counsel. They are quite in point, but we are wholly unable to agree with their conclusions. One is *Ryan* v. *The New York Central Railroad Co.*, 35 N. Y. 214, and the other is *Kerr* v. *The Pennsylvania Railroad Co.*, decided by the Supreme Court of Pennsylvania, at its May term, 1870. These two cases stand alone, and we believe they are directly in conflict with every English or American case, as yet reported, involving this question.

As we understand these cases, they hold that, where the fire is communicated by the locomotive to the house of A., and thence to the house of B., there can be no recovery by the latter. It is immaterial, according to the doctrine of these cases, how narrow may be the space between the two houses, or whether the destruction of the second would be the natural consequence of the burning of the first. The principle laid down by these authorities and urged by counsel in this case is, that, in order to a recovery, the fire which destroys the plaintiff's property must be communicated directly from the railway, and not through the burning of intermediate property.

. . . . . .

Both these opinions, upon which we are commenting, expressly admit, as both Courts have decided, that if through the negligence of a railway company, fire is communicated to the building of A., he may recover. But suppose the building is a wooden tenement, one hundred feet in length, extending from the railway. In the Pennsylvania case, the second building was only thirty-nine feet from the first. We presume that Court would hold, and appellee's counsel would admit, that A. might recover for the value of his entire building, one hundred feet in length. But suppose B. owns the most remote fifty feet of the building, could he recover? We suppose not, under the rule announced in these cases. But why should he not, under any definition of proximate cause that has ever been given by any Court or text writer? Take that of Greenleaf, with which counsel for appellee claim to be content. He says the damage must be "the natural and proximate consequence of the act complained of." Is not the burning of the second fifty feet of the building in the case supposed, the natural and proximate consequence of the act complained of, to wit, the careless ignition of the first fifty feet? If it is admitted that there may be a recovery for the second fifty feet of the building as well as for the first, when there is one continuous building, and whether owned by one person or by two, is it possible that, when the second fifty feet is removed a short space from the first, but still is so near that the burning of the one makes almost certain the destruction of the other,

there can be no recovery? Is not the burning of the second building still "the natural and proximate consequence of the act complained of?" It seems to us that the arbitrary rule enforced in these two cases, which is simply this, that when there is negligence, there may be a recovery for the first house or field, but in no event for the second, rests on no maintainable ground, and would involve the administration of the law in cases of this character in absurd inconsistencies. We believe there is no other just or reasonable rule than to determine in every instance whether the loss was one which might reasonably have been anticipated from the careless setting of the fire, under all the circumstances surrounding the careless act at the time of its performance. If loss has been caused by the act, and it was, under the circumstances, a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause, whether the house burned was the first or the tenth, the latter being so situated that its destruction is a consequence reasonably to be anticipated from setting the first on fire. If, on the other hand, the fire has spread beyond its natural limits by means of a new agency — if, for example, after its ignition, a high wind should arise, and carry burning brands to a great distance, by which a fire is caused in a place that would have been safe but for the wind — such a loss might fairly be set down as a remote consequence, for which the railway company should not be held responsible.

The Court of Appeals in New York, and the Supreme Court of Pennsylvania, seem, from their opinions, to have attached great weight to an argument urged upon us by the counsel for appellee, and indeed that argument seems to have been the chief reason for announcing a rule which both courts struggle in vain to show is not in conflict with all prior adjudications. That argument is, in brief, that an entire village or town is liable to be burned down by the passing of the fire from house to house, and if the railway company, whose locomotive has emitted the cinders that caused the fire, is to be charged with all the damages, these companies would be in constant danger of bankruptcy, and of being obliged to suspend their operation. We confess ourselves wholly unable to see the overpowering force of this argument. It proceeds upon the assumption that, if a great loss is to be suffered, it had better be distributed among a hundred innocent victims than wholly visited upon the wrong-doer.

As a question of law or ethics, the proposition does not commend itself to our reason. We must still cling to the ancient doctrine, that the wanton wrong-doer must take the consequences of his own acts, whether measured by a thousand dollars or a hundred thousand.

As to the railroads, however useful they may be to the regions they traverse, they are not operated by their owners for benevolent purposes, or to promote the public welfare. Their object is pecuniary profit. It is a perfectly legitimate object, but we do not see why they should be exempted from the moral duty of indemnification for injuries

committed by the careless or wanton spread of fire along their track, because such indemnity may sometimes amount to so large a sum as to sweep away all their profits. The simple question is, whether a loss, that must be borne somewhere, is to be visited on the head of the innocent or the guilty. If, in placing it where it belongs, the consequence will be the bankruptcy of a railway company, we may regret it, but we should not, for that reason, hesitate in the application of a rule of such palpable justice.

But is it true that railroads cannot thrive under such a rule? They have now been in operation many years, and extend over very many thousand miles, and we have never yet heard of town or village that has been destroyed by a fire ignited by their locomotives. Improved methods of construction, and a vigilant care in the management of locomotives, have made the probability of loss from this cause so slight that we cannot but regard the fears of the disastrous consequences to the railway companies which may follow from an adherence to the ancient rule, as in a large degree chimerical. A case may occur at long intervals in which they will be required to respond in heavy damages; but better this, than that they should be permitted to evade the just responsibilities of their own negligence, under the pretence that the existence of the road may be endangered. It were better that a railway company should be reduced to bankruptcy, and even suspend its operations, than that the courts should establish for its benefit a rule intrinsically unjust, and repugnant not merely to ancient precedent, but to the universal sense of right and wrong.

MILWAUKEE AND SAINT PAUL RAILWAY COMPANY *v.* KELLOGG.

1876. 94 *United States*, 469.[1]

Error to the Circuit Court of the United States for the District of Iowa.

The original action was brought by Kellogg to recover compensation for the destruction by fire of the plaintiff's saw-mill and a quantity of lumber, situated and lying in the State of Iowa, and on the banks of the river Mississippi. That the property was destroyed by fire was uncontroverted. From the bill of exceptions, it appears that the "plaintiff alleged the fire was negligently communicated from the defendants' steamboat 'Jennie Brown' to an elevator built of pine lumber, and one hundred and twenty feet high, owned by the defendants, and standing on the bank of the river, and from the elevator to the plaintiff's saw-mill and lumber piles, while an unusually strong wind was blowing from the elevator towards the mill and lumber. On the trial it was admitted that the defendants owned the steamboat and

[1] The statement of facts has been abridged, and a part of the case omitted — Ed

elevator; that the mill was five hundred and thirty-eight feet from the elevator, and that the nearest of plaintiff's piles of lumber was three hundred and eighty-eight feet distant from it."

The jury returned a verdict for plaintiff; and found specially, 1st, That the elevator was burned from the steamer "Jennie Brown"; 2d, that such burning was caused by not using ordinary care and prudence in landing at the elevator, under circumstances existing at that particular time; and 3d, that the burning of the mill and lumber was the unavoidable consequence of the burning of the elevator.

Mr. John W. Cary, for plaintiff in error.

Mr. Myron H. Beach, for defendants in error.

STRONG, J. [After stating the case and deciding other questions.] The next exception is to the refusal of the Court to instruct the jury as requested, that "if they believed the sparks from the 'Jennie Brown' set fire to the elevator through the negligence of the defendants, and the distance of the elevator from the nearest lumber pile was three hundred and eighty-eight feet, and from the mill five hundred and twenty-eight feet, then the proximate cause of the burning of the mill and lumber was the burning of the elevator, and the injury was too remote from the negligence to afford a ground for a recovery." This proposition the Court declined to affirm, and in lieu thereof submitted to the jury to find whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator; whether it was a result which, under the circumstances, would naturally follow from the burning of the elevator; and whether it was the result of the continued effect of the sparks from the steamboat, without the aid of other causes not reasonably to be expected. All this is alleged to have been erroneous. The assignment presents the oft-embarrassing question, what is and what is not the proximate cause of an injury. The point propounded to the Court assumed that it was a question of law in this case; and in its support the two cases of *Ryan* v. *The New York Central Railroad Co.*, 35 N. Y. 210, and *Kerr* v. *Pennsylvania Railroad Co.*, 62 Penn. St. 353, are relied upon. Those cases have been the subject of much criticism since they were decided; and it may, perhaps, be doubted whether they have always been quite understood. If they were intended to assert the doctrine that when a building has been set on fire through the negligence of a party, and a second building has been fired from the first, it is a conclusion of law that the owner of the second has no recourse to the negligent wrong-doer, they have not been accepted as authority for such a doctrine, even in the States where the decisions were made. *Webb* v. *The Rome, Watertown & Ogdensburg Railroad Co.*, 49 N. Y. 420, and *Pennsylvania Railroad Co.* v. *Hope*, 80 Penn. St. 373. And certainly they are in conflict with numerous other decided cases. *Kellogg* v. *The Chicago & North-western Railroad Co.*, 26 Wis. 224; *Perley* v. *The Eastern Railroad Co.*, 98 Mass. 414;

Higgins v. *Dewey*, 107 id. 494; *Fent* v. *The Toledo, Peoria, & Warsaw Railroad Co.*, 49 Ill. 349.

The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place, 2 Bl. Rep. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. These circumstances, in a case like the present, are the strength and direction of the wind, the combustible character of the elevator, its great height, and the proximity and combustible nature of the saw-mill and the piles of lumber. Most of these circumstances were ignored in the request for instruction to the jury. Yet it is obvious that the immediate and inseparable consequences of negligently firing the elevator would have been very different if the wind had been less, if the elevator had been a low building constructed of stone, if the season had been wet, or if the lumber and the mill had been less combustible. And the defendants might well have anticipated or regarded the probable consequences of their negligence as much more far-reaching than would have been natural or probable in other circumstances. We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. In a succession of dependent events an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. Thus,

if a building be set on fire by negligence, and an adjoining building be destroyed without any negligence of the occupants of the first, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first. Yet in truth, in a very legitimate sense, the immediate cause of the burning of the second was the burning of the first. The same might be said of the burning of the furniture in the first. Such refinements are too minute for rules of social conduct. In the nature of things, there is in every transaction a succession of events more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time.

If we are not mistaken in these opinions, the Circuit Court was correct in refusing to affirm the defendants' proposition, and in submitting to the jury to find whether the burning of the mill and lumber was a result naturally and reasonably to be expected from the burning of the elevator, under the circumstances, and whether it was the result of the continued influence or effect of the sparks from the boat, without the aid or concurrence of other causes not reasonably to have been expected. The jury found, in substance, that the burning of the mill and lumber was caused by the negligent burning of the elevator, and that it was the unavoidable consequence of that burning. This, in effect, was finding that there was no intervening and independent cause between the negligent conduct of the defendants and the injury to the plaintiff. The judgment must, therefore, be affirmed.[1]

Judgment affirmed.

[1] In *Northern Pacific R. Co.* v. *Lewis*, 51 Fed. Rep. 658, after the beginning of the fire the wind shifted from south to north, a change which was usual at that time of year. GILBERT, J., said (p. 666): "It is contended that the jury should have been allowed to determine whether the change in the wind was an intervening cause. No authority has been cited which supports this contention. It is only the occurrence of a heavy and extraordinary wind that has in certain cases been held to be an intervening cause. A simple and not unusual change in the direction of the wind cannot be said to disturb the unbroken connection between the wrongful act and the injury, and hence is not an intervening cause. The jury were properly so instructed." — ED.

POLLOCK, C. B., IN GREENLAND *v.* CHAPLIN.

1850. 5 *Exchequer*, 248.

I ENTERTAIN considerable doubt, whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. Whenever that case shall arise, I shall certainly desire to hear it argued, and to consider whether the rule of law be not this: that a person is expected to anticipate and guard against all reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect to occur.

EARL, J., IN EHRGOTT *v.* MAYOR OF NEW YORK.

1884. 96 *New York*, 280, 281.

IT is sometimes said that a party charged with a tort, or with breach of contract, is liable for such damages as may reasonably be supposed to have been in the contemplation of both parties at the time, or with such damage as may reasonably be expected to result, under ordinary circumstances, from the misconduct, or with such damages as ought to have been foreseen or expected in the light of the attending circumstances, or in the ordinary course of things. These various modes of stating the rule are all apt to be misleading, and in most cases are absolutely worthless as guides to the jury. *Leonard* v. *N. Y. &c., Tel. Co.*, 41 N. Y. 544. Parties when they make contracts usually contemplate their performance and not their breach, and the consequences of a breach are not usually in their minds, and it is useless to adopt a fiction in any case that they were. When a party commits a tort resulting in a personal injury, he cannot foresee or contemplate the consequences of his tortious act. He may knock a man down, and his stroke may, months after, end in paralysis or in death,— results which no one anticipated or could have foreseen. A city may leave a street out of repair, and no one can anticipate the possible accidents which may happen, or the injuries which may be caused. Here, nothing short of Omniscience could have foreseen for a minute what the result and effect of driving into this ditch would be. Even for weeks and months after the accident the most expert physicians could not tell the extent of the injuries.

The true rule, broadly stated, is that a wrong-doer is liable for the damages which he causes by his misconduct. But this rule must be practicable and reasonable, and hence it has its limitations. A rule to be

of practicable value in the administration of the law, must be reasonably certain. It is impossible to trace any wrong to all its consequences. They may be connected together and involved in an infinite concatenation of circumstances. As said by Lord Bacon, in one of his maxims (Bac. Max. Reg. 1): "It were infinite for the law to judge the cause of causes, and their impulsion one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." The best statement of the rule is that a wrong-doer is responsible for the natural and proximate consequences of his misconduct; and what are such consequences must generally be left for the determination of the jury. *Milwaukee & St. P. R. Co.* v. *Kellogg*, 94 U. S. 469. We are, therefore, of opinion that the judge did not err in refusing to charge the jury that the defendant was liable "only for such damages as might reasonably be supposed to have been in the contemplation of the plaintiff and defendant as the probable result of the accident."

reasonable man

SMITH *v.* LONDON AND SOUTHWESTERN RAILWAY COMPANY.

1870. *Law Reports*, 6 *Common Pleas*, 14.[1]

APPEAL to the Exchequer Chamber from a decision of the Court of Common Pleas, L. R. 5 Com. Pl. 98, discharging a rule to enter a verdict for the defendants or a nonsuit.

This was an action for negligence, whereby it was alleged that plaintiff's cottage was burned.

The defendants pleaded not guilty, and issue was joined thereon.

The case was tried before Keating, J., at the summer assizes, 1869, held at Dorchester, when evidence was given for the plaintiff which was in substance as follows: —

It was proved that the defendants' railway passed near the plaintiff's cottage, and that a small strip of grass extended for a few feet on each side of the line, and was bounded by a hedge which formed the boundary of the defendants' land; beyond the hedge was a stubble-field, bounded on one side by a road, beyond which was the plaintiff's cottage. About a fortnight before the fire the defendants' servants had trimmed the hedge and cut the grass, and left the trimmings and cut grass along the strip of grass. On the morning of the fire the company's servants had raked the trimmings and cut-grass into small heaps. The summer had been exceedingly dry, and there had been many fires about in consequence. On the day in question, shortly after two trains had passed the spot, a fire was discovered upon the strip of

[1] The statement of facts has been abridged. The arguments, and portions of the opinions, are omitted. — ED.

grass land forming part of the defendants' property; the fire spread to the hedge and burnt through it, and caught the stubble-field, and, a strong wind blowing at the time, the flames ran across the field for 200 yards, crossed the road, and set fire to and burnt the plaintiff's cottage. There was no evidence that the defendants' engines were improperly constructed or worked; there was no evidence except the fact that the engines had recently passed, to show that the fire originated from them. There was no evidence whether the fire originated in one of the heaps of trimmings or on some other part of the grass by the side of the line; but it was proved that several of the heaps were burnt by the fire. Two of the company's servants were proved to have been close to the spot when the fire broke out, and to have given the alarm, but they were not called by either side.

At the close of the plaintiff's case the counsel for the defendants submitted that there was no case to go to the jury. At the suggestion of the judge, and by consent, a verdict was taken for the plaintiff for 30*l.*, subject to leave reserved to the defendants to move to set it aside, and instead thereof to enter a verdict for them, on the ground that there was no evidence to go to the jury of any liability on the part of the defendants. The Court to be at liberty to draw inferences and to amend the pleadings.

The defendants applied for and obtained a rule pursuant to the leave reserved, which, after argument, was discharged, Law Rep. 5 C. P. 98, and from the judgment so given discharging the rule the present appeal was brought.

Kingdon, Q.C. (*Murch* with him), for defendants.

Cole, Q.C. (*Bere*, Q.C., with him), for plaintiff.

KELLY, C. B. [After holding that there was some evidence of negligence on the part of the defendants, and negligence which caused the damage complained of.] Then comes the question raised by Brett, J., to which at first I was inclined to give some weight. He puts it thus: "I quite agree that the defendants ought to have anticipated that sparks might be emitted from their engines, notwithstanding that they were of the best construction, and were worked without negligence, and that they might reasonably have anticipated that the rummage and hedge trimmings allowed to accumulate might be thereby set on fire. But I am of opinion that no reasonable man would have foreseen that the fire would consume the hedge and pass across a stubble-field, and so get to the plaintiff's cottage at the distance of 200 yards from the railway, crossing a road in its passage." It is because I thought, and still think, the proposition is true that any reasonable man might well have failed to anticipate such a concurrence of circumstances as is here described that I felt pressed at first by this view of the question; but on consideration I do not feel that that is a true test of the liability of the defendants in this case. It may be that they did not anticipate, and were not bound to anticipate, that the plaintiff's cottage would be burnt as a result of their negligence; but I think the law is, that if

they were aware that these heaps were lying by the side of the rails, and that it was a hot season, and that therefore by being left there the heaps were likely to catch fire, the defendants were bound to provide against all circumstances which might result from this, and were responsible for all the natural consequences of it. I think, then, there was negligence in the defendants in not removing these trimmings, and that they thus became responsible for all the consequences of their conduct, and that the mere fact of the distance of this cottage from the point where the fire broke out does not affect their liability, and that the judgment of the Court below must be affirmed.

CHANNELL, B. I am of the same opinion. I quite agree that where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not, and this is what was meant by Bramwell, B., in his judgment in *Blyth* v. *Birmingham Waterworks Co.*, 11 Ex. 781; 25 L. J. (Ex.) 212, referred to by Mr. Kingdon; but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.

BLACKBURN, J. I also agree that what the defendants might reasonably anticipate is, as my Brother Channell has said, only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence. I have still some doubts whether there was any evidence that they were negligent, but as all the other judges are of opinion that there was evidence that they were, I am quite content that the judgment of the Court below should be affirmed. I do not dissent, but I have some doubt, and will state from what my doubt arises. [After discussing this question, the learned judge continued.] But I doubt on this point, and, therefore, doubt if there was evidence of negligence; if the negligence were once established, it would be no answer that it did much more damage than was expected. If a man fires a gun across a road where he may reasonably anticipate that persons will be passing, and hits some one, he is guilty of negligence, and liable for the injury he has caused; but if he fires in his own wood, where he cannot reasonably anticipate that any one will be, he is not liable to any one whom he shoots, which shows that what a person may reasonably anticipate is important in considering whether he has been negligent; but if a person fires across a road when it is dangerous to do so and kills a man who is in the receipt of a large income, he will be liable for the whole damage, however great, that may have resulted to his family, and cannot set up that he could not have reasonably expected to have injured any one but a laborer.

[Opinions were also delivered by MARTIN, B., PIGOTT, B., and LUSH, J. BRAMWELL, B., concurred in the decision.]

Judgment affirmed.

HILL *v.* WINSOR.

1875. 118 *Massachusetts*, 251.[1]

Tort against the owners of a steam-tug for personal injuries sustained by the plaintiff, through the alleged negligence of those in charge of the tug in causing her to strike violently against the fender of Warren Bridge, on which the plaintiff was at work. The fender which was built to protect the bridge, consisted of piles driven perpendicularly into the bed of the stream, about twelve feet apart, with other piles driven at an angle to each of these, one of which was fastened to the top of each perpendicular pile, with a cap on top extending along the whole row of piles. Plaintiff was at work standing on a plank nailed to the piles, and, in order to fit an inclined pile to the perpendicular one and the cap, he had put in a brace about a foot long to keep the inclined pile and the upright one apart while he was at work. While the plaintiff was so at work, he saw the tug coming towards the fender, and, before he could get on the cap, the tug struck the fender about three piles from him, the jar caused the brace between the piles to fall out, the piles came together, the plaintiff was caught between them and severely injured.

Bacon, J., after giving full instructions as to what would constitute negligence, further instructed the jury as follows: —

"The accident must be caused by the negligent act of the defendants; but it is not necessary that the consequences of the negligent act of the defendants should be foreseen by the defendants. It is not necessary that either the plaintiff or the defendants should be able to foresee the consequences of the negligence of the defendants in order to make the defendants liable. It may be a negligent act of mine in leaving something in the highway. It may cause a man to fall and break his leg or arm, and I may not be able to foresee one or the other. Still, it is negligence for me to put this obstruction in the highway, and that may be the natural and necessary cause. In this case, it is for the jury to say whether this injury, which the plaintiff suffered, was a natural and necessary consequence of the negligence of the defendants, if they were negligent."

O. W. Holmes, Jr., and *W. A. Munroe*, for defendants.

E. H. Derby and *W. C. Williamson*, for plaintiff.

Colt, J. [omitting part of opinion]. It cannot be said, as matter of law, that the jury might not properly find it obviously probable that injury in some form would be caused to those who were at work on the fender by the act of the defendants in running against it. This constitutes negligence, and it is not necessary that injury in the precise form in which it in fact resulted should have been foreseen. It is enough that it now appears to have been a natural and probable consequence. *Lane* v. *Atlantic Works*, 111 Mass. 136, and cases cited. [Omitting opinion on other points.] *Exceptions overruled.*

[1] The statement of facts has been much abridged, and the greater part of the case omitted. — Ed

BISHOP *v.* ST. PAUL CITY RAILWAY COMPANY.

1892. 48 *Minnesota*, 26.[1]

APPEAL by defendant from an order of the District Court of Ramsey County, Kelly, J., made June 30, 1891, refusing a new trial.

Action to recover for injuries received by plaintiff, January 27, 1888, while a passenger upon defendant's Selby Avenue cable line. The trailer in which he rode was going east, and was overturned near the foot of the hill on the curve into Third Street. Plaintiff was standing in st. car at the time, holding himself steady by a hand strap. He was thrown down and injured about his head, but soon went about his business. On September 5, 1888, paralysis supervened, involving the whole left side. The action was tried January 28, 1891, before a struck jury.

In his general charge the judge said: ". . . The plaintiff must prove to your satisfaction that, as a matter of fact, and not as a mere conjecture, the accident did set in motion the causes which at last resulted in his paralysis."

Near the close of the charge to the jury, the judge, at the verbal request of plaintiff's counsel, said to the jury: "If in the accident the plaintiff received injuries which resulted in the disease that ultimately resulted in paralysis, then the accident is the proximate cause of the paralysis. All the physicians have said that the direct cause of plaintiff's present condition, and of his condition when he brought this suit, was the bursting of a blood vessel in the brain. Now, if you believe from the evidence that the accident set in motion certain things which caused or brought about this bursting of the blood vessel, then the accident is the direct or proximate cause of the injury." To this defendant excepted. Defendant requested the judge to direct the jury to return a verdict for the defendant. This being refused, he excepted.

Defendant moved for a new trial, on the ground of newly-discovered evidence, and for errors in law occurring at the trial, and because the verdict was not justified by the evidence, and was contrary to law, and the damages excessive. The motion was denied, and defendant appealed.

Henry J. Horn, for appellant.

Munn, Boyesen & Thygeson, for respondents.

DICKINSON, J. 1 [The court held "that the verdict of the jury cannot be disturbed for want of proof of negligence."]

2. The case presents the question as to whether the plaintiff's grave infirmities, which became manifest some time after the accident, were a result of the accident. The plaintiff was standing in the rear car

[1] Statement rewritten. Arguments omitted. Only part of opinion is given. — ED.

or coach, supporting himself by holding on straps suspending from the upper part of the car for that purpose. When the car was thrown on its side, as it reached the curve in its rapid descent, he was thrown down, the impulse being such as to break his hold on the supporting straps. He immediately became unconscious, but regained consciousness in a few moments, and did not then seem to have been very seriously injured. On the right side of his head, above the ear, were a few cuts, apparently not very harmful, and a small contusion, the marks of which disappeared within a few days. He went about his business the same day, and continued to do so thereafter for a considerable period of time. But while, according to the proof, he had always before the accident been in good health, and had never suffered the ills or exhibited the symptoms which followed it, the evidence goes to show that, from that time on, a marked change became manifest in his physical and mental condition. He became nervous and irritable; was troubled with inability to sleep; suffered a dull, heavy pain in the back of the head, extending sometimes further down the back. There was a feeling of pressure within the head, as though it would burst. When sleeping, the scene of the accident was repeatedly pictured to his mind in dreams. His mental functions were affected, his mind being "muddled," as he expresses it. These conditions did not pass away, but became more aggravated, and on the 5th of September, some seven months after the accident, without other apparent cause than the circumstances here referred to, paralysis supervened, involving the whole left side. The paralytic condition still continues, and, according to the opinions of competent expert witnesses, will always exist. The plaintiff was fifty years of age. While upon this appeal the facts must, without doubt, be taken to be as above indicated, the question was closely contested as to whether the paralysis, caused immediately by the rupture of a blood vessel in the brain, is the result of the accident and the shock and injury then received. A careful examination of the voluminous evidence bearing upon this point shows that the verdict in favor of the plaintiff is certainly justified. The proof was chiefly the testimony of numerous competent medical experts. The examination of these witnesses on both sides was conducted with marked intelligence, skill, and thoroughness; and while these witnesses, whose competency to testify on the subject is beyond question, do not agree in their opinions, it seems apparent that the jury were as well informed as they could be, from the nature of the case, to form a correct conclusion. It is needless to here enter into any extended statement of the pathology of the case, as given by these witnesses, or to contrast the views and reasons given for their opinions. There is little or no controversy over the fact that the rupture of the blood vessel causing the paralysis is to be ascribed to a degeneration or impaired condition of the blood vessel, the process of which degeneration might have extended over a considerable period of time before the occurrence of the rupture. But whether such de-

generation or impairment of health of the blood vessels was or could have been caused by the accident and injury then received, the experts disagree. Upon this point we will only say that the opinion of several competent witnesses is that it was so caused, and it may be added that one of the explanations given for such an opinion is that the physical concussion (which produced temporary unconsciousness) and the mental shock affected and impaired the nutrition of the nerve cells of the brain which preside over and control the circulation of blood in that organ, so that the blood vessels became distended from an excessive flow of blood, and gradually degenerated, and became weakened, until they were incapable of resisting the pressure. In support of the opinions of experts in favor of the plaintiff's side of this issue are to be considered also the facts, which the evidence tended to show, of the health of the plaintiff up to the time of the accident; that the ills which he suffered from that time on indicated an excess or unnatural pressure of blood in the brain; and that an examination of the plaintiff disclosed no disease or functional derangement of other organs to which the paralysis might be attributed.

. . . . . .

5. The instruction referred to in the ninth assignment of error was not, as applied to the case before the jury, erroneous. (The injury received at the time of the accident was the proximate cause of the paralysis, if it caused the disease in the course of which and as a result of which the paralysis followed.)

. . . . . .

Order affirmed.

SCHEFFER *v.* WASHINGTON, &c. RAILROAD CO.

1881. 105 *United States*, 249. For Def. Aff.

ERROR to the Circuit Court of the United States for the Eastern District of Virginia.

The facts are stated in the opinion of the Court.

Mr. George A. King, with whom were *Mr. Charles King* and *Mr. John B. Sanborn*, for the plaintiffs in error.

Mr. Linden Kent, *contra*.

MR. JUSTICE MILLER delivered the opinion of the Court.

The plaintiffs, executors of Charles Scheffer, deceased, brought this action to recover of the Washington City, Virginia Midland and Great Southern Railroad Company damages for his death, which they allege resulted from the negligence of the company while carrying him on its road. The defendant's demurrer to their declaration was sustained.

and to reverse the judgment rendered thereon they sued out this writ of error.

The statute of Virginia under which the action was brought is, as to the question raised on the demurrer, identical with those of all the other States, giving the right of recovery when the death is caused by such default or neglect as would have entitled the party injured to recover damages if death had not ensued.

The declaration, after alleging the carelessness of the officers of the company, by which a collision occurred between the train on which Scheffer was and another train, on the seventh day of December, 1874, proceeds as follows: —

"Whereby said sleeping-car was rent, broken, torn, and shattered, and by means whereof the said Charles Scheffer was cut, bruised, maimed, and disfigured, wounded, lamed, and injured about his head, face, neck, back, and spine, and by reason whereof the said Charles Scheffer became and was sick, sore, lame, and disordered in mind and body, and in his brain and spine, and by means whereof phantasms, illusions, and forebodings of unendurable evils to come upon him, the said Charles Scheffer, were produced and caused upon the brain and mind of him, the said Charles Scheffer, which disease, so produced as aforesaid, baffled all medical skill, and continued constantly to disturb, harass, annoy, and prostrate the nervous system of him, the said Charles Scheffer, to wit, from the seventh day of December, A. D. 1874, to the eighth day of August, 1875, when said phantasms, illusions, and forebodings, produced as aforesaid, overcame and prostrated all his reasoning powers, and induced him, the said Charles Scheffer, to take his life in an effort to avoid said phantasms, illusions, and forebodings, which he then and there did, whereby and by means of the careless, unskilful, and negligent acts of the said defendant aforesaid, the said Charles Scheffer, to wit, on the eighth day of August, 1875, lost his life and died, leaving him surviving a wife and children."

The Circuit Court sustained the demurrer on the ground that the death of Scheffer was not due to the negligence of the company in the judicial sense which made it liable under the statute. That the relation of such negligence was too remote as a cause of the death to justify recovery, the proximate cause being the suicide of the decedent, — his death by his own immediate act.

In this opinion we concur.

Two cases are cited by counsel, decided in this Court, on the subject of the remote and proximate causes of acts where the liability of the party sued depends on whether the act is held to be the one or the other; and, though relied on by plaintiffs, we think they both sustain the judgment of the Circuit Court.

The first of these is *Insurance Company* v. *Tweed*, 7 Wall. 44.

In that case a policy of fire insurance contained the usual clause of exception from liability for any loss which might occur "by means of

any invasion, insurrection, riot, or civil commotion, or any military or usurped power, explosion, earthquake, or hurricane."

An explosion took place in the Marshall warehouse, which threw down the walls of the Alabama warehouse, — the one insured, situated across the street from Marshall warehouse, — and by this means, and by the sparks from the Eagle Mill, also fired by the explosion, facilitated by the direction of the wind, the Alabama warehouse was burned. This Court held that the explosion was the proximate cause of the loss of the Alabama warehouse, because the fire extended at once from the Marshall warehouse, where the explosion occurred. The Court said that no new or intervening cause occurred between the explosion and the burning of the Alabama warehouse. That if a new force or power had intervened, sufficient of itself to stand as the cause of the misfortune, the other must be considered as too remote.

This case went to the verge of the sound doctrine in holding the explosion to be the proximate cause of the loss of the Alabama warehouse; but it rested on the ground that no other proximate cause was found.

[The learned Judge here stated the case of *Milwaukee & St. Paul R. R. Co.* v. *Kellogg, supra.*]

Bringing the case before us to the test of these principles, it presents no difficulty. (The proximate cause of the death of Scheffer was his own act of self-destruction. It was within the rule in both these cases a new cause, and a sufficient cause of death.)

The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment, to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that "great first cause least understood," in which the train of all causation ends.

The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train.

His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him and his death.

Judgment affirmed.

MALONE *v.* CAYZER, IRVINE & COMPANY.

1908. 45 *Scottish Law Reporter*, 351.

In First Division.

Appeal from Sheriff Court at Glasgow.

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), Schedule 1, sec. 1, enacts, "The amount of compensation under this Act shall be, (*a*) When death results from the injury . . ."

In an arbitration under the Workmen's Compensation Act 1897 between Mrs. Mary Ann Mullen or Malone, 401 Rutherglen Road, Glasgow, pursuer, and Cayzer, Irvine & Company, shipowners, 109 Hope Street, Glasgow, defenders, the pursuer claimed compensation for the death of her husband. The Sheriff-Substitute (Davidson) sustained a plea that the application was irrelevant, and dismissed it. An appeal was taken.

The stated case set forth that the appellant made, *inter alia*, the following averments: ". . . (2) On or about the 25th May, 1907, and for some months prior thereto, the said deceased John Malone was in the employment of the respondents at their repairing shop in Finnieston Street as a hammerman. Said repairing shop is a factory within the meaning of the Workmen's Compensation Act 1897.

"(3) On said date, about 7.30 A. M., the said deceased John Malone was engaged in the course of his employment in said repairing shop cutting an iron ladder. Another of respondent's workmen was holding a chisel against said ladder and deceased was striking the chisel with his hammer, when a piece of said iron ladder flew off, penetrating his right eye.

"(4) The said deceased John Malone was taken to the Eye Infirmary, where his eye was treated, and he was then sent home. About twenty years before the date of said accident the said deceased John Malone had met with an accident which caused him to lose the sight of his left eye, and when he was injured on 25th May, 1907, the sight of his right eye immediately began to fail, and became gradually worse until he was rendered almost blind.

"(5) In consequence of the said injury the said John Malone received a severe shock, and his nervous system completely broke down. Owing to the gradual loss of sight in his right eye and consequent blindness, the said John Malone's mind became affected and he became insane, and on 20th August, 1907, he committed suicide in his house at 401 Rutherglen Road.

"(6) The death of the said John Malone was due to the foresaid accident, which arose out of and in the course of his employment with the respondents in their said factory at Finnieston Street."

The question of law was, "Whether, in the circumstances set forth in the case, the application was rightly dismissed."

Argued for appellant. — The appellant was entitled to prove her averments that her husband's insanity and consequent death were due to the accident. The deceased's insanity was brought on by loss of sight. Such a form of insanity was recognized by medical science and by the leading alienists (*e. g.* Clouston). The question at issue was whether the suicide was a natural result of the injury, apart from whether it was a probable consequence of it or not. That was a pure question of fact, of which the appellant was entitled to a proof. *Dunham* v. *Clare*, (1902) 2 K. B. 292, *per* Collins (M. R.), p. 296. Reference was also made to *Golder* v. *Caledonian Railway Company*, November 14, 1902, 5 F. 123, 40 S. L. R. 89.

Argued for respondents. — The decree of the Sheriff was right. Malone's death was due to his own act. His suicide could not be regarded as the natural consequence or even as the probable result of the accident. It was not directly traceable to the injury, and if it were so traceable there was, in the words of Collins (M. R.), a new act giving a fresh origin to the after consequences. *Dunham, cit. supra.* The damages were too remote to justify inquiry. Suicide was not an "accident" in the sense of the Workmen's Compensation Act. *Hensey* v. *White*, (1900) 1 Q. B. 481 (opinion of Collins, L. J.). The primary and actual cause of Malone's death was the diseased condition of his brain. In any event that was a *novus actus interveniens.* Reference was made by way of contrast to *Lloyd* v. *Sugg & Company*, (1900) 1 Q. B. 486.

At advising —

Lord President. The facts which give rise to the controversy here are certainly somewhat out of the common. It is an arbitration under the Workmen's Compensation Act, the claimant in it being the widow of a workman called Malone, who was in the employment of the respondents Cayzer, Irvine & Company. The averments of the claimant and appellant set forth that while Malone was at his work in May a splinter of iron flew into his right eye. That, of course, was an ordinary accident in the course of his employment, which, had he survived, would have entitled him to make a claim for compensation in the ordinary way. It seems that he had many years before lost the sight of his other eye, and the injury was such that the sight of his remaining eye, according to the averments, immediately began to fail, and became gradually worse until he was rendered almost blind. Then, continues the claimant, — I now read textually, — "In consequence of said injury the said John Malone received a severe shock, and his nervous system completely broke down. Owing to the gradual loss of sight in his right eye, and consequent blindness, the said John Malone's mind became affected, and he became insane, and on 20th August, 1907, he committed suicide in his house at 401 Rutherglen Road. The death of the said John Malone was due to the foresaid accident, which arose out of and in course of his employment with the respondents."

Now, upon that statement of the facts, the learned Sheriff-Substitute, before whom the case came as arbiter, dismissed the application as irrelevant. The claimant has appealed to your Lordships, and the motion before us is to send the case back to the sheriff and tell him to allow a proof of those averments which I have read. Of course there can be no question, I take it, as to the accident having actually happened, — that is to say, the splinter going into his eye; but what happened afterwards is evidently matter upon which there may be controversy.

The expression in the statute is that the death must be the result of the injury, and really the views which I hold have been so extremely well expressed by Lord Collins when he was Master of the Rolls that I prefer to take what he has said rather than try to re-express them myself. The passage which I am going to cite is taken from the case of *Dunham* v. *Clare*, L. R. (1902) 2 K. B. 292. The state of the facts in that case was that a man was carrying some heavy pipes, one of which slipped and fell on his foot, inflicting a wound in his toe. He was put into a hospital, and a disease called phlegmonous erysipelas supervened. The evidence was that erysipelas of this description was a very unusual consequence of a wound of the kind, and that, according to the theory which at present obtains, was caused by the introduction, somewhere or other, of a germ. Lord COLLINS says this: "The applicant for compensation therefore has to show an accident causing injury, and death or incapacity resulting from the injury. In the present case there was admittedly an accident causing injury, and the only question is whether death in fact resulted from the injury. If death in fact resulted from the injury, it is not relevant to say that death was not the natural or probable consequence thereof. The question whether death resulted from the injury resolves itself into an inquiry into the chain of causation. If the chain of causation is broken by a *novus actus interveniens*, so that the old cause goes and a new one is substituted for it, that is a new act which gives a fresh origin to the after consequences. In dealing with an obligation created by the Act, we are not dealing with a case of contract or tort or with a liability of a criminal nature. In the case of contract, a person who commits a breach of it is liable for the consequences which naturally follow from the breach. So, too, in cases of tort, when the question arises whether a person is liable in respect of a breach of some duty imposed upon him, he probably, and in some cases certainly, comes under a somewhat larger liability than would be the case if it were a breach of contract, but still the liability is measured by what are the reasonable and probable consequences of his breach of duty. That lets in the consideration of reasonableness. No question of reasonableness comes into the present discussion. The Act has imposed the liability, irrespective of any error of judgment or negligence on the part of the employer. The only question to be considered is, Did the death or incapacity, in fact, result from the injury?" That exactly expresses

my opinion, and if that is so I think that the Sheriff-Substitute was too quick here in dismissing this case as irrelevant upon the face of it.

I do not think I ought to say much more, except to explain that I am very far from saying that upon the face of this pleading there is evidently made out a case, because the question is whether causation is or is not made out, and it may be a somewhat uphill matter for the claimant to prove her case. I should like to say that she will have to do something more than say simply that there was a possibility of death arising from such an injury in such a way — she must show that it was in fact the result of the injury I have some doubts as to whether the state of knowledge of cerebral pathology is so fixed as, in circumstances like this, to enable one to reach such a conclusion, but I do not think we could try the matter from our own ideas on such subjects. Therefore I am of opinion that we should remit the case to the Sheriff-Substitute, and order him to allow an inquiry into the matters averred.

LORD M'LAREN. If we were to criticise the statements of facts in this case with the same strictness which we do in questions of relevancy in actions in this court, there is a great deal I think to be said against the relevancy of the averments, because I cannot gather from the Sheriff-Substitute's statement anything more than this, that the man committed suicide in consequence of the depression of mind brought on by his blindness. There is no averment of insanity in the physiological sense of a result of disease of the brain, but merely that a man had committed suicide, and is supposed to have done so under some insane impulse. It seems to me that in construing the Act of Parliament, and particularly the beginning of the First Schedule, we must hold that when the Act prescribes as a condition of compensation that death results from the injury, what is within the contemplation of the statute is a material injury with death materially resulting from it. To explain what I mean regarding insanity: If a person, being a workman, were to receive a blow or a wound on the head which set up inflammation of the brain, and a medical expert came to the conclusion that the injury to the brain was a result of the blow on the head, and if the injury went on and left the man in an insane condition, from which eventually he died, then I should not for a moment doubt that the man's death was the result of the accident. But, on the other hand, it is easy to figure cases of death resulting only from the moral effect of an accident. If, for example, a man in consequence of the loss of his sight took to drinking and shortened his life by intemperance, that would be a very clear case for not giving compensation, because although in a sense death was the result of the injury, it was not a material but a moral result. Now, in this case I am not disposed, any more than your Lordship, to construe the statement of the Sheriff-Substitute, which is merely an echo of the averments of the party, with great strictness. I think there

ought to be a proof, and as the parties might wish to bring the case before us again, I hope the Sheriff-Substitute will direct his attention to the point whether this is insanity that would be proved by medical evidence of the symptoms, or whether it is anything more than just a mode of stating the supposed cause, because there must be some cause for the suicide. I agree that it is desirable to have the facts brought before us, and I notice that in the case of *Dunham*, (1902) 2 K. B. 292, which your Lordship cited, there had been an inquiry, and the judgment of the court proceeded upon a statement of the facts proved in the case.

Lord Kinnear. (The question whether death has resulted from an accident is always a question of fact.) Therefore I think it is indispensable that the arbitrator should have the facts ascertained before he decides it. I therefore agree that the case should go back to the learned Sheriff in order that the petitioner may have an opportunity of proving her case if she can. That being so, I think the less one says about the *primâ facie* aspect of the statement of the facts probably the better, but one cannot help seeing that there may be a difficulty in connecting the accident with the alleged result by an unbroken chain of connection. The exact point where the difficulty may arise I do not know, but speaking for myself I do not think I have sufficient knowledge of the pathology of insanity to form even a provisional opinion. Therefore I think it better to say that I agree with your Lordships that the facts must be ascertained.

Lord Pearson was absent.

The court answered the question in the case in the negative, recalled the determination of the arbiter, and remitted to the Sheriff-Substitute as arbiter, to allow parties a proof of their averments.

Counsel for the Pursuer (Appellant), *Morison*, K. C., *J. A. Christie*. Agents, *St. Clair Swanson & Manson*, W. S.

Counsel for the Defenders (Respondents), *Hunter*, K. C., *R. S. Horne*. Agents, *Anderson & Chisholm*, Solicitors.

DAVIS *v.* STANDISH.

1882. 33 *N. Y. Supreme Court* (26 *Hun*), 608.[1]

ACTION under the Civil Damage Act, alleging that plaintiff's husband came to his death by drowning, in consequence of having been intoxicated by liquor sold to him by the defendant, and that she was thereby injured in her means of support.

The statute (Laws of 1873, chap. 646) provides, in substance, that certain persons, and among others a wife, who shall be injured in means of support by any intoxicated person, "or in consequence of the intoxication, habitual or otherwise, of any person," shall have a right of action against any person who, by selling intoxicating liquors, "caused the intoxication, in whole or in part, of such person or persons"; and may recover all damages sustained and also exemplary damages.

Davis, after buying liquor of defendant, and repeatedly drinking at defendant's bar, started down Canandaigua Lake in a boat with one Wood. The boat upset and Davis was drowned. The evidence warranted the conclusion that the drowning was the result of Davis's inability to use his normal powers by reason of intoxication.

At the trial, defendant contended that, at the time he sold the liquor to Davis, he could not have anticipated that Davis would go out on the lake that night; the evidence being that Davis had arranged with defendant for his passage home by the stage of which defendant was the proprietor, and that after such arrangement was made Davis was induced by Wood to change his mind and go to Wood's house, Davis and Wood taking a boat on the lake part of the way.

Counsel for defendant argued that the active agency of Wood, in persuading Davis to go home with him and not to go in the stage as he had arranged, was the more immediate and proximate cause of the drowning; and, as such change of purpose could not have been anticipated by the defendant when he furnished the liquor which produced the intoxication, defendant is not liable.

The judge instructed the jury, in part, as follows: —

"It is not necessary that the death, or the circumstances which immediately led to or produced it, should have been within the contemplation of the person who sold the liquor. The man who sells liquor to another, whether lawfully or unlawfully, is not protected against the provisions of the statute, because he does not, at the time he sells the liquor, contemplate it will lead the man into circumstances where he is liable to lose his life. . . . It is only necessary that the liquor sold or furnished shall have produced, either in whole or in part, a state of intoxication, and that that state of intoxication should have been the direct and proximate cause of the death, whether the circum-

[1] Statement rewritten. Opinion omitted. — ED.

stances under which the death occurred were within the possible or impossible contemplation of the party who sold or furnished the liquor."

Defendant excepted to the charge.

Verdict and judgment for plaintiff. Defendant appealed.

H. L. Comstock, for appellant.

E. B. Pottle, for respondent.

THE COURT (in an opinion by SMITH, P. J.,) *held* the charge "a correct statement of the law."

DODGE, J., IN BARKER *v.* WESTERN UNION TELEGRAPH COMPANY.

1908. *Supreme Court of Wisconsin*, 114 *Northwestern Reporter*, 439–440.

DODGE, J. The liability of telegraph companies for failure to perform their duty to correctly transmit and deliver messages, whether that duty result from a contract or otherwise, has been the subject of a vast amount of litigation and discussion. One question which has pervaded and confused a considerable majority of the decided cases has been eliminated by our statute (section 1778, St. 1898), making them "liable for all damages occasioned" by failure or negligence in performance of that duty. That statute, last carefully construed in *Fisher* v. *Western Union Telegraph Co.*, 119 Wis. 146, 96 N. W. 545, has removed as a condition of liability all necessity that the telegraph company should have had in contemplation, or had any notice or suggestion of probability of, such damages as are in fact occasioned. "It is only necessary as to any particular result that it shall have been a natural consequence of the injury, having regard to the usual course of nature and of cause and effect in line of unbroken physical causation." *Fisher* v. *Telegraph Co.*, 119 Wis. 153, 96 N. W. 545. We are therefore absolved from consideration of whether there was anything upon the face of this telegram to suggest that loss of the character claimed would be suffered by reason of non-delivery.

THE QUEEN *v.* SAUNDERS AND ARCHER.

Warwick Assizes, 15 *Elizabeth*. 2 *Plowden*, 473.[1]

IT appears by the record that John Saunders, late of Greneborough, in the County of Warwick, husbandman, and Alexander Archer, late of Framton, in the said county, yeoman, were arraigned before the justices upon an indictment, for that the aforesaid John Saunders, the 20th day of September, in the 14th year of the reign of the present Queen, with force and arms, &c., at Greneborough, in the county aforesaid, being seduced by the instigation of the devil, feloniously gave and ministered to one Eleanor Saunders, his daughter, two pieces of a roasted apple mixed with poison, called arsenick and roseacre,

[1] The formal statement of the record is omitted. — ED.

with an intent that she might die by the operation of the same poison; which said Eleanor, after the receipt of the same pieces of apple so mixed with poison aforesaid into her body, languished of the poison and the operation thereof from the aforesaid 20th day of September, in the said 14th year, unto the 22d day of September then next following, on which said 22d day of September she died of the poison aforesaid: And that the aforesaid Alexander Archer, before the murder aforesaid by the said John Saunders in form aforesaid perpetrated, viz. the 16th day of September, in the said 14th year, at Greneborough aforesaid, feloniously procured and advised the said John Saunders to do and perpetrate the murder aforesaid, against the peace, &c. And upon their arraignment they pleaded not guilty, and a jury was empanelled to try them. And upon their examinations and the evidence given (as I was credibly informed, for I was not present, and therefore what I here report is upon the relation of the said justices of assize and of the clerk of assize) the truth of the matter appeared to the justices to be thus. The said John Saunders had a wife whom he intended to kill, in order that he might marry another woman with whom he was in love, and he opened his design to the said Alexander Archer, and desired his assistance and advice in the execution of it, who advised him to put an end to her life by poison. With this intent the said Archer bought the poison, viz. arsenick and roseacre, and delivered it to the said John Saunders to give it to his wife, who accordingly gave it to her, being sick, in a roasted apple, and she ate a small part of it, and gave the rest to the said Eleanor Saunders, an infant, about three years of age, who was the daughter of her and the said John Saunders, her husband. And the said John Saunders seeing it, blamed his wife for it, and said that apples were not good for such infants; to which his wife replied that they were better for such infants than for herself: and the daughter eat the poisoned apple, and the said John Saunders, her father, saw her eat it, and did not offer to take it from her, lest he should be suspected, and afterwards the wife recovered, and the daughter died of the said poison.

And whether or no this was murder in John Saunders, the father, was somewhat doubted, for he had no intent to poison his daughter, nor had he any malice against her, but on the contrary he had a great affection for her, and he did not give her the poison, but his wife ignorantly gave it her; and although he might have taken it from the daughter, and so have preserved her life, yet the not taking it from her did not make it felony, for it was all one whether he had been present or absent as to this point, inasmuch as he had no malice against the daughter, nor any inclination to do her any harm. But at last the said justices, upon consideration of the matters, and with the assent of Saunders, Chief Baron, who had the examination of the said John Saunders before, and who had signified his opinion to the said justices (as he afterwards said to me), were of opinion that the said offence was murder in the said John Saunders. And the reason

thereof (as the said justices and the chief baron told me) was because the said John Saunders gave the poison with an intent to kill a person, and in the giving of it he intended that death should follow. And when death followed from his act, although it happened in another person than her whose death he directly meditated, yet it shall be murder in him, for he was the original cause of the death, and if such death should not be punished in him, it would go unpunished; for here the wife, who gave the poisoned apple to her daughter, cannot be guilty of any offence, because she was ignorant of any poison contained in it, and she innocently gave it to the infant by way of necessary food, and therefore it is reasonable to adjudge her innocent in this case, and to charge the death of the infant, by which the Queen has lost a subject, upon him who was the cause of it, and who intended death in the act which occasioned the death here. But if a man prepares poison, and lays it in several parts of his house, with an intent to kill rats and such sort of vermin, and a person comes and eats it, and dies of it, this is not felony in him who prepared and laid it there, because he had no intent to kill any reasonable creature. But when he lays the poison with an intent to kill some reasonable creature, and another reasonable creature, whom he does not intend to kill, is poisoned by it, such death shall not be dispunishable, but he who prepared the poison shall be punished for it, because his intent was evil. And therefore it is every man's business to foresee what wrong or mischief may happen from that which he does with an ill intention, and it shall be no excuse for him to say that he intended to kill another, and not the person killed. For if a man of malice prepense shoots an arrow at another with an intent to kill him, and a person to whom he bore no malice is killed by it, this shall be murder in him, for when he shot the arrow he intended to kill, and inasmuch as he directed his instrument of death at one, and thereby has killed another, it shall be the same offence in him as if he had killed the person he aimed at, for the end of the act shall be construed by the beginning of it, and the last part shall taste of the first, and as the beginning of the act had malice prepense in it, and consequently imported murder, so the end of the act, viz. the killing of another, shall be in the same degree, and therefore it shall be murder, and not homicide only. For if one lies in wait in a certain place to kill a person, and another comes by the place, and he who lies in wait kills him out of mistake, thinking that he is the very person whom he waited for, this offence is murder in him, and not homicide only, for the killing was founded upon malice prepense. So in the principal case, when John Saunders of malice prepense gave to his wife the instrument of death, viz. the poisoned apple, and this upon a subsequent accident killed his daughter, whom he had no intention to kill, this is the same offence in him as if his act had met with the intended effect, and his intention in doing the act was to commit murder, wherefore the event of it shall be murder. And so the justices declared their opinions to the jurors, whereupon they found

both the prisoners guilty, and John Saunders had his judgment and was hanged. [Omitting the discussion as to the liability of Archer.]

NOTE BY REPORTER. *Collige ex hoc*, that if one maliciously intends to burn the house of A. only, and not the house of B., and yet in burning the house of A. the house of B. happens to be burnt, in this case the burning of the house of B. is felony, and the party may be indicted as having maliciously burnt it. 3 Inst. 67; N. P. C. 85; 1 H. H. P. C. 569; 1 Hawk. P. C. 106, f. 5.

SALISBURY *v.* HERCHENRODER.

1871. 106 *Mass.* 458.[1]

TORT for injuries done to a building owned and occupied by the plaintiffs on the north side of Avon Street in Boston. The defendant was lessee and occupant of an adjoining building on the same street, and suspended what was called a banner-sign, bearing his name upon the banner, across the street, upon a wire rope, one end of which was fastened by an iron bolt to his building, and the other end in like manner to a building on the south side of the street. The sign was made of net-work for the purpose of diminishing its resistance of the wind, and due care was used in its construction and fastening. The lowest part of it was at least twenty feet above the pavement of the street; and it did not interfere with the ordinary enjoyment of the neighboring estates; but it was hung there in violation of an ordinance of the city of Boston, which rendered the defendant liable to a penalty for each day during which it remained suspended. On September 8, 1869, in what was commonly known as the "great gale" of that year, which was a gale of extraordinary violence, the wind blew the sign away, and the movement of the sign, which remained attached to the rope, jerked the iron bolt out of the building on the south side of the street, and hurled it across the street and through the glass of a window in the plaintiffs' building, thus doing the injuries for which they sought to recover. The plaintiffs' window was properly constructed, and they were in no way chargeable with negligence.

The parties stated the foregoing case for the judgment of the Superior Court, which ordered judgment for the defendant, and the plaintiffs appealed.

J. P. Treadwell, for plaintiffs.

R. Stone, Jr., for defendant. . . .

Even if the defendant violated the city ordinance relating to the projection of signs over streets, he is not liable in this action unless that violation of the law caused the injuries to the plaintiffs' property. The relation of cause and effect must exist between his act and their loss. The case is analogous to the cases against railroad corporations in which it is held that their failure to comply with statutes requiring them to

[1] The citations of plaintiffs' counsel, and parts of the argument for defendant, are omitted. — ED.

station a flagman at the crossing of a highway, or blow a whistle or ring a bell, is not conclusive evidence of negligence, unless it produced the injury. *Wakefield* v. *Connecticut & Passumpsic Rivers Railroad Co.*, 37 Vt. 330; *Steves* v. *Oswego & Syracuse Railroad Co.*, 18 N. Y. 422, 425; *Brooks* v. *Buffalo & Niagara Falls Railroad Co.*, 25 Barb. 600; *Dascomb* v. *Buffalo & State Line Railroad Co.*, 27 Barb. 221. The defendant's violation of the ordinance was not in any legal sense the cause of the injuries to the plaintiffs. They were the result of inevitable accident.

CHAPMAN, C. J. If the defendant's sign had been rightfully placed where it was, the question would have been presented whether he had used reasonable care in securing it. If he had done so, the injury would have been caused, without his fault, by the extraordinary and unusual gale of wind which hurled it across the street and against the plaintiffs' window. The party injured has no remedy for an injury of this character, because it is produced by the *vis major*. For example, a chimney or roof, properly constructed and secured with reasonable care, may be blown off by an extraordinary gale, and injure a neighboring building; but this is no ground of action.

But the defendant's sign was suspended over the street in violation of a public ordinance of the city of Boston, by which he was subject to a penalty. Laws & Ordinances of Boston (ed. 1863), 712. He placed and kept it there illegally, and this illegal act of his has contributed to the plaintiffs' injury. The gale would not of itself have caused the injury, if the defendant had not wrongfully placed this substance in its way.

It is contended that the act of the defendant was a remote, and not a proximate cause of the injury. But it cannot be regarded as less proximate than if the defendant had placed the sign there while the gale was blowing; for he kept it there till it was blown away. . . . It is also, in this respect, like the placing of a spout, by means of which the rain that subsequently falls is carried upon the plaintiff's land. The act of placing the spout does not alone cause the injury. The action of the water must intervene, and this may be a considerable time afterwards. Yet the placing of the spout is regarded as the proximate cause. So the force of gravitation brings down a heavy substance, yet a person who carelessly places a heavy substance where this force will bring it upon another's head does the act which proximately causes the injury produced by it. (The fact that a natural cause contributes to produce an injury, which could not have happened without the unlawful act of the defendant, does not make the act so remote as to excuse him.). . .

Judgment for the plaintiffs affirmed.

WYANT *v.* CROUSE.

1901. 127 *Michigan*, 158.

ERROR to Cass; Smith, J. Submitted March 7, 1901. Decided June 17, 1901.

Case by William B. Wyant and Judith A. Wyant against George Crouse to recover damages for the destruction of property by fire. From a judgment for defendant on verdict directed by the court, plaintiffs bring error. Reversed.

M. L. Howell, for appellants.

Cassius M. Eby, for appellee.

HOOKER, J. The plaintiffs commenced an action by declaration against the defendant to recover damages for the destruction of a blacksmith shop and other property by fire. The declaration stated that he wrongfully broke into the shop, and started a fire in the forge, and the undisputed proof shows that he did so. The declaration purports to be in case, and, after alleging the wrongful entry and building of a fire, alleges negligence in managing it, and a consequent fire a short time after defendant left the shop. It seems to be conceded that, if this was to be treated as a count in trespass *quare clausum*, the action was barred by the statute of limitations; and the court, acting upon the theory that it was case, directed a verdict, upon the ground that no negligence was shown.

The testimony shows that the defendant was a blacksmith, who sometimes worked in the shop for plaintiffs' son, who occupied the shop as plaintiffs' tenant; that on this occasion he went to the shop to sharpen some shoes, built a fire in the forge, did his work, and went away. It is in evidence that the wind was blowing, and that, about ten minutes after he went away, the shop was discovered to be on fire in the southwest corner of the building, the forge being in the northeast corner, and the flames coming out from the roof. The only fire on the floor was that which dropped from above. The forge was connected with the chimney by an old stove pipe, that went up through a ceiling of boards. The defendant stated, the day after the fire, that when he left the shop there was apparently no fire around, but there were some shavings lying around, and he did not know but a spark or piece of hot iron had dropped in the shavings, and that when he went there he found no fire in the shop. The court seems to have considered the wrongful entry as out of the case, and the defendant liable only for a want of ordinary care, after building the fire, in looking after it and keeping it from doing damage. The plaintiffs' counsel

insists that the act was wrongful, and might be shown to be so, though it involved a trespass, and that he was liable for the consequences.

We agree with the circuit judge that there is no proof tending to show an absence of ordinary care, but there certainly is proof tending to show that the only fire on the premises came from that started by the defendant. Hence the case is reduced to the question whether trespass *quare clausum* is the only remedy for an injury resulting to real estate and personal property inadvertently destroyed by a trespasser. Defendant's act, if a trespass, consisted in breaking, entering, and building a fire in the shop. He would have been liable for that in an action of trespass. After he left, the fire burned the shop and adjoining buildings and personal property. There is no doubt that as to the latter, *i. e.*, the personal property, the plaintiffs might sue in case, whether they could recover in trespass or not. 3 Comp Laws, § 10400. It is clear that they could not recover in case for the direct damage necessarily done by his trespass to the land. *Wood* v. *Railroad Co.*, 81 Mich. 358 (45 N. W. 980); *Haines* v *Beach*, 90 Mich. 563 (51 N. W. 644). They are not attempting to do so. No claim is made for damages for the mere breaking, entry, or use of the forge, but only for the damage done by the fire.

When one trespasses on land, he is liable for the direct injury to the freehold, and the consequences naturally to be expected arising therefrom, in an action of trespass. Attendant acts, such as assault and battery, slander, injury to personal property, etc., may be shown, if alleged, by way of explaining the trespass, and in aggravation thereof, in all States where exemplary damages are recoverable, and doubtless under our own somewhat modified rule relating to exemplary damages. But in such case the amount of damages is not necessarily to be measured by the injury to the person, the reputation, or the personal property, damages for which may, instead of being sought by way of aggravation, be recovered in suitable actions. *Thayer* v. *Sherlock*, 4 Mich. 173; *Roberts* v. *Druillard*, 123 Mich. 286 (82 N. W. 49). In the former case it was held that such claims, being specifically alleged, had been recovered for as separate causes of action, and not by way of aggravation. Tiff Justice's Guide, 807.

If consequential damages may be recovered in any case of trespass *quare clausum*, it seems obvious that in some they cannot, and that case should be resorted to. There is an intimation in the case of *Barry* v. *Peterson*, 48 Mich. 264 (12 N. W. 181), that case is the proper remedy in such instances. In that case there was a direct trespass, snow being thrown on plaintiff's land, between the houses of plaintiff and defendant, whereby plaintiff's house was injured through its melting. A recovery was had in case. There was more reason for anticipating injury in that case than in the one before us. In *Ives* v. *Williams*, 53 Mich. 636 (19 N. W. 562), the propriety of declaring in case for consequential injuries is recognized. Several counts in case were joined to one in trespass. The court said that, in the absence of

an allegation of consequential damages, it must be considered a count in trespass, and therefore a misjoinder. Again, in *Wood* v. *Railroad Co.*, 81 Mich. 363 (45 N. W. 980), Mr. Justice Champlin appears to have recognized that, when damages are consequential, case will lie, for he said: —

"The injury caused by the trespass in this case was no more indirect and consequential than such as arises in every case of trespass caused by forcible entry and direct injury to the plaintiff's possession and freehold."

In the cases of *Chandler* v. *Allison*, 10 Mich. 460, and *Allison* v. *Chandler*, 11 Mich. 542, the injury was not consequential, but a direct and natural consequence, to be expected.

In the case before us, the defendant intended no such injury, nor did he any act which can be said to have given reason for expecting the consequences. It was a fortuitous consequence of his act, entirely unforeseen. The actual trespass was of little significance compared with this consequential injury. If a wrong-doer, he would be responsible for the damage, if it resulted from the building of a fire by him, regardless of the degree of care used. Hence the propriety of setting up his wrongful entry, which, though proper in a declaration in trespass, does not necessarily impress that character upon this declaration, which expressly states that it is in case, and describes a consequential injury, following and growing out of acts constituting a trespass.

The following authorities, taken from 26 Am. & Eng. Enc. Law, p. 706, will show the trend of authority upon this subject: *Gates* v. *Miles*, 3 Conn. 64; *Barnes* v. *Hurd*, 11 Mass. 57; *Waldron* v. *Hopper*, 1 N. J. Law, 339; *Case* v. *Mark*, 2 Ohio, 169; *Taylor* v. *Rainbow*, 2 Hen. & M. 423; *Jordan* v. *Wyatt*, 4 Grat. 151 (47 Am. Dec. 720); *Branscomb* v *Bridges*, 1 Barn. & C. 145; *Smith* v. *Goodwin*, 2 Nev. & M. 114; *Frankenthal* v. *Camp*, 55 Ill. 169; *Schuer* v. *Veeder*, 7 Blackf. 342; *Johnson* v. *Castleman*, 2 Dana, 377; *Dalton* v. *Favour*, 3 N. H. 465; *Gilson* v. *Fisk*, 8 N. H. 404; *Blin* v. *Campbell*, 14 Johns. 432; *Percival* v. *Hickey*, 18 Johns. 257 (9 Am. Dec. 210); *McAllister* v. *Hammond*, 6 Cow. 342; *Brennan* v. *Carpenter*, 1 R. I. 474; *Howard* v. *Tyler*, 46 Vt. 683; *Claflin* v. *Wilcox*, 18 Vt. 605; *Waterman* v. *Hall*, 17 Vt. 128 (42 Am. Dec. 484). Most of these cases relate to trespass to persons or personal property, but the analogy is close. The case of *Jordan* v. *Wyatt*, *supra*, contains a lengthy discussion of the distinction between direct and consequential injuries.

The liability of the defendant is based upon a wrongful act, and the nature of the act, and not the consequences, determines his liability. He was engaged in an unlawful act, and therefore was liable for all the consequences, indirect and consequential as well as direct, and there is no occasion to discuss the degree of his negligence in permitting the shop to burn, if the fire was caused by the fire he builded. This accountability for the consequences is not affected by the form of action.

The judgment is reversed, and a new trial ordered.

Moore, Long, and Grant, JJ., concurred with Hooker, J.

Montgomery, C. J. (*dissenting*). The trespass was not committed against the plaintiffs, but against their tenant. The subsequent fire was not, particularly as to the plaintiffs' adjoining property, a wrong against plaintiffs.

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HARRISON *v.* BERKLEY.

1847. 1 *Strobhart's Reports, Law* (*South Carolina*), 525.[1]

Tried before Mr. Justice Wardlaw, at Kershaw, Spring Term, 1847.

The following is the report of the presiding judge: —

This was an action of trespass on the case, in which the plaintiff sought to recover damages, for that the defendant, being a shopkeeper, in violation of the statute on the subject, and to the wrong of the plaintiff, sold and delivered ardent spirits to Bob, a slave of the plaintiff, by means whereof the said slave became intoxicated, and died.

It appeared that on the 24th day of December, 1845, Bob, being patroon of one of the plaintiff's boats, on his way from Charleston went into the shop of defendant in Camden, and there received a gallon jug and a quart bottle of whiskey, and started with them in the afternoon, to convey to his master in Fairfield, across the Wateree, intelligence of the boat's arrival. Bob drank none at the shop, but drank repeatedly from the bottle before he reached the river, at the ferry, and afterwards; fell down in the road repeatedly; fell into a creek, in which he would have been drowned, but for the aid of some white men then in his company; and soon afterwards, at the fork of the roads, proceeded alone, staggering. He was clad in homespun, and had a bundle, besides the jug, on his back. The night was misty, and somewhat cold. He called at a house and got fire, returned and went again. Next morning he was found dead near the house where he had called; the jug of whiskey full and corked near him, the bottle not to be seen; and upon movement of his body, a fluid smelling like whiskey flowed from his mouth. A physician examined his body upon the inquest, but could discover no external injury; and from the want of rigidity in the muscles and other appearances, had no doubt that he died of drunkenness and exposure.

A witness for the plaintiff swore positively that he was present in the defendant's shop, and saw Bob hand his jug and bottle empty to the defendant, and receive them from the defendant full of whiskey, this conversation passing: Defendant to Bob, when he handed back

[1] The arguments are omitted. — Ed.

the jug, "Now, mind, old fellow, don't hurt yourself or me either." Bob, "No, sir, I wont hurt you or myself either. How much do I owe you?" Defendant, "Two dollars." Bob, "I'll pay you to-morrow when I come to unload the boat."

A brother of the defendant (as to whom eight witnesses testified against his credit, and four in favor of it), and one Shegog, who was acting as occasional assistant in the shop, testified that Bob applied to the defendant for liquor, but the defendant refused to let him have it. Eli Bass, a free negro (who was chief patroon of the fleet to which Bob's boat belonged), then took the jug and handed it to the defendant, who filled it and handed it back to Bass, who delivered it to Bob, there being no bottle then seen.

I submitted to the jury the question of fact, whether the defendant sold or delivered the liquor to Bob, saying, upon a proposition urged by the plaintiff, that if the sale was really made to Bass, the defendant was not answerable, although he may have suspected that Bass would deliver the liquor to Bob; but that if the defendant knew that Bass was employed as a mere instrument to enable Bob to make the purchase, such an artifice would place the defendant in no better situation than if the delivery had been direct to Bob.

The question mainly argued was as to the liability of the defendant for the death of the negro, said to be a consequence of his wrongful act.

I held, that for truly proximate consequences, which, in the ordinary course of nature, do actually result from a wrongful act, even where there is no wicked intention, recovery to the extent of the actual loss may be had, although the consequences may be such as are neither necessary nor easy to be foreseen.

That where there was fraud, malice, gross negligence, or active evil intention, consequences less truly proximate may be regarded, and damages be carried beyond the actual loss.

That in a case where no aggravation from evil motive arose (and such I thought this case), natural consequences not immediately proximate would be considered, if they were probable; but either those consequences called remote, or those less proximate consequences which were improbable, would be disregarded.

Assuming then, that there was in this case no aggravation from evil motive, and that the injurious consequences were not immediately proximate, I left it to the jury (if they should find that the defendant had been guilty of the wrongful act of selling or delivering liquor to a slave) to decide whether the drinking, intoxication, exposure, and death of the slave, were the natural and probable consequences of that wrongful act,— holding that if so, the defendant was answerable for the value of the slave.

I endeavored by various instances to illustrate the meaning of the terms I used, and to explain the difference between damages actual and speculative, proximate and remote, probable and contingent, natural and extraordinary; and difficult as it was, by instances, to show

these diversities, I find it much more difficult by any general terms to give precision to the propositions I laid down.

The jury found for the plaintiff six hundred and fifty dollars; and the defendant appeals on the grounds annexed.

The defendant gives notice that he will move the Court of Appeals for a nonsuit in this case, on the ground that the declaration and proof made no sufficient cause of action in law. That the injury was too remote. Failing in this, then for a new trial.

1. Because his Honor charged the jury, that if the defendant knew that the whiskey was intended for Bob, when he delivered it to Bass, he is as liable as if he had delivered it to Bob.

2. Because his Honor charged the jury, that if the natural and probable consequence of giving the liquor to Bob was that he would drink, the defendant is liable for his value, if he died.

3. Because Bob did not die from the effect of the liquor alone, but from the combined effect of the liquor and exposure, for the latter of which the defendant is not liable, and therefore not liable at all.

4. Because the damage was too remote from the injury, and not a necessary, natural, or probable consequence of the wrong.

5. Because the verdict is clearly against the evidence.

J. M. DeSaussure, for the motion.

Smart and *Gregg*, *contra*.

WARDLAW, J., delivered the opinion of the Court.

This action is novel in the instance, but that is no objection to it if it be not new in principle. The law endures no injury from which damage has ensued without some remedy; but directs the application of principles already established to every new combination of circumstances that may be presented for decision.

It has, however, been urged here again, as it was on the circuit, that admitting everything which the plaintiff has alleged, he has presented either a case of damage without legal injury, or a case of injury without legal damage.

First. Damage without injury. It is said, that the act of selling or giving whiskey to the slave, Bob, was not in itself a wrong to the plaintiff, but was only a violation of a penal statute, which has imposed upon such acts penalties, to be recovered by indictment; and that, therefore, no action by the plaintiff lies, nor any remedy but the indictment prescribed by the statute.

The wrong, for which an action of trespass on the case lies, may be either an unlawful act, or a lawful act done under circumstances which render it wrongful,— any act done or omitted, contrary to the general obligation of the law, or the particular rights and duties of the parties. It might not be difficult to distinguish between the selling or giving of spirituous liquor to a slave, and the fair selling to a slave of an article which could not be expected to produce harm; and to show that, independent of any express statutory prohibition, the former act is so contrary to the rights of the master, and to the duties imposed

upon other persons in a slave-holding community, that the person who does it without special matter of excuse subjects himself to liability for all the legal damage that may thence ensue; in like manner, as if he had carelessly or wantonly placed noxious food within the reach of domestic animals. But this case may be rested where the plaintiff left it. Our statutes, time after time, have subjected him who sells to a slave any article without license, to fine and imprisonment upon his conviction after indictment; and the last statute on the subject provides especially for the punishment, upon conviction after indictment, of him who sells or gives spirituous liquor to a slave. No express prohibition is contained in either of the statutes, but the penalties necessarily imply a prohibition, and make the thing prohibited unlawful. 10 Co. 75. For the injury to the public, the only remedy is that provided by the statute, — indictment; but, as in case of a nuisance to the whole community, if any person has suffered a particular damage beyond that suffered by the public, he may maintain an action in respect thereof, 2 Ld. Ray. 985; so in case of a misdemeanor punishable by statute, a party grieved is entitled to his action for the particular damage done to him by reason of the unlawful act.

Second. We come then to the main ground assumed in the defence, — that no legal damage followed the injury, but that which was shown was too remote,— not such a consequence of the injury as the law will notice.

It would be vain to attempt to define with precision the terms which have been used on this subject, or to lay down any general rules by which consequences that shall be answered for, and those which are too remote for consideration, may be always distinguished. But we will endeavor, without dwelling on particular cases, to deduce from the general course of decision on this point, so much as may show that the instructions given were sufficiently favorable for the defendant, and that verdict is conformable to law.

We are troubled here with no distinctions between loss sustained and gain prevented; nor with any between cases which have been aggravated by evil motive, and those which have not been: for the plaintiff here has claimed only compensation for his actual loss; and the defendant may be regarded as the jury were instructed to regard him, — that is, as one who, with no particular evil purpose, or ill-will towards master or slave, has violated the law only for his own gain.

A distinction, however, is to be observed between cases where the damage ensues whilst the injurious act is continued in operation and force, and those where the damage follows after the act has ceased. In the former class, were the cases of Wright & Gray, 2 Bay, 464, and all the cases which have been cited, or supposed, of slaves put without permission of the owners on race-horses, in steamboats, or on railroads; those of property injured during a deviation from the course which was prescribed concerning it, 6 Bing. 716; and in general all,

where unexpected damage was done whilst an unauthorized interference with another's rights lasted. Here it is usually of small moment to inquire, whether the damage was the natural consequence of the injury, because the immediate connection between the wrongful act and the damage sustained shows that the damage, however extraordinary, has actually resulted directly from the injury. But in the latter class, to which the case before us must be assigned, the connection is not immediate between the injury and the consequences; and it becomes indispensable to discriminate in some way between the various consequences that in some sense may be said to proceed from the act, for all of them cannot constitute legal damage.

Every incident will, when carefully examined, be found to be the result of combined causes, and to be itself one of various causes which produce other events. Accident or design may disturb the ordinary action of causes, and produce unlooked for results. It is easy to imagine some act of trivial misconduct or slight negligence, which shall do no direct harm, but set in motion some second agent that shall move a third, and so on, until the most disastrous consequences shall ensue. The first wrong-doer, unfortunate rather than seriously blamable, cannot be made answerable for all of these consequences. He shall not answer for those which the party grieved has contributed by his own blamable negligence or wrong to produce, or for any which such party, by proper diligence, might have prevented. Com. Dig. Action on the Case, 134; 11 East, 60; 2 Taunt. 314; 7 Pick. 284. But this is a very insufficient restriction; outside of it would often be found a long chain of consequence upon consequence. Only the proximate consequence shall be answered for. 2 Greenleaf Ev. 210, and cases there cited. The difficulty is to determine what shall come within this designation. The next consequence only is not meant, whether we intend thereby the direct and immediate result of the injurious act, or the first consequence of that result. What either of these would be pronounced to be would often depend upon the power of the microscope with which we should regard the affair. Various cases show that in search of the proximate consequences the chain has been followed for a considerable distance, but not without limit, or to a remote point. 8 Taunt. 535; Peake's Cases, 205. Such nearness in the order of events, and closeness in the relation of cause and effect, must subsist, that the influence of the injurious act may predominate over that of other causes, and shall concur to produce the consequence, or may be traced in those causes. To a sound judgment must be left each particular case. The connection is usually enfeebled, and the influence of the injurious act controlled, where the wrongful act of a third person intervenes, and where any new agent, introduced by accident or design, becomes more powerful in producing the consequence than the first injurious act. 8 East, 1; 1 Esp. 48. It is, therefore, required that the consequences to be answered for should be natural as well as proximate. 7 Bing. 211; 5 B. & Ad. 645. By this, I under-

stand, not that they should be such as upon a calculation of chances would be found likely to occur, nor such as extreme prudence might anticipate, but only that they should be such as have actually ensued one from another, without the occurrence of any such extraordinary conjuncture of circumstances, or the interventiou of any such extraordinary result, as that the usual course of nature should seem to have been departed from. In requiring concurring consequences, that they should be proximate and natural to constitute legal damage, it seems that in proportion as one quality is strong, may the other be dispensed with: that which is immediate cannot be considered unnatural; that which is reasonably to be expected will be regarded, although it may be considerably removed. 20 Wend. 223.

It has been supposed, in argument, that without any of these distinctions, it is always sufficient to inquire only, whether the consequences have certainly proceeded from the injurious act; but it will be seen that in settling what have certainly proceeded from the act, we will be obliged to determine what are natural and proximate, unless we mean to run to absurd extremes.

In the case before us, the defendant has insisted that the damage resulted not so much from his act, as from the acts of the slave, who was a moral being, and a free agent. 4 M'Cord, 223. In cases where damage has been done during the continuance of a wrongful interference with a slave, it was considered of no consequence that the slave was a free agent, 2 Rich. 613; Id. 455; 9 La. Rep. 213; for there the consent of the slave could not justify the interference, and even the wilful act of the slave producing the damage was like any other improbable misfortune, which might have occurred, whilst the wrongful act was in operation. But in cases like this, the will of a slave may well interrupt the natural consequences of a wrong-doer's act, and produce consequences for which he should not answer. Selling whiskey to a slave is no more unlawful than selling to a slave any other article, without license. And if a rope, sold to a slave, without license and without suspicion of mischief, should be employed by the slave to hang himself, the prominent ground of distinction between that case and the present one would depend upon the will of the slave. If it should be said that the slave would have got a rope elsewhere, or would have taken some other means of self-destruction, it might be answered that if this defendant had not sold the whiskey, Bob would have got it, or some other means of intoxication, elsewhere. But where the mischievous purpose of a slave is manifest, or should be foreseen by ordinary prudence, the injurious act embraces the will of the slave as one of its ingredients; the wrong consists, in part, in ministering to the purpose; and natural consequences of that purpose (although the purpose may have been carried to an extent not anticipated, or the consequences may have been altogether undesigned and unusual) are the legal consequences of the injurious act. Therefore, it was well left to the jury to decide whether the drinking and intoxi-

cation of Bob were the natural and probable consequences of selling liquor to him. If fault be found with the instructions given on this head, it is that they were too favorable to the defendant, in requiring that the consequences should be found to be probable as well as natural. For proximate and natural consequences, not controlled by the unforeseen agency of a moral being, capable of discretion, and left free to choose, or by some unconnected cause of greater influence, a wrong-doer must generally answer, however small was the probability of their occurrence. In many instances the will of a slave, as a controlling cause, would be found as feeble as was the will of a child that received damage from a cart left carelessly in the street, which he unlawfully attempted to drive. 1 Adol. & El. N. S. 28. Often the intervention of a third person's will, influenced by the injurious act, has no effect in rendering consequences too remote. 1 Adol. & El. 43; 2 C. Mee. & Rosc. 707.

The defendant, however, has further insisted, that if the drinking and intoxication were the proximate and natural consequences of his act, the exposure and death were not; but that the death resulted mainly from the exposure, and not from the intoxication only. It may well be said (speaking in the language of everyday life, which attempts no philosophical analysis) that the exposure was the immediate effect of the intoxication, and that the two produced the death. Thus, without any unconnected influence to be perceived, the death has come from the intoxication which the defendant's act occasioned. The defendant cannot complain that an agent which his own act naturally brought into operation has occurred to produce the result. The proximity in order of events, and intimacy of relation as cause and effect, between the injurious act and the damage, are as great here as in various cases which have been cited. 17 Pick. 78; 3 Scott, New R. 386; 17 Wend. 71; 9 Wend. 325; 11 East, 571; and the cases before cited.

The jury have decided the facts, and this Court is of opinion that under the inferences which must be drawn from the finding, the verdict is free from the objection that the damages were too remote.

The instructions concerning a delivery to Bass, as an instrument of Bob, are approved.

The motion is dismissed.

Withers, J., having been of Counsel in this cause, gave no opinion.

WILEY *v.* WEST JERSEY RAILROAD COMPANY.

1882. 44 *New Jersey Law Reports*, 247.[1]

On rule to show cause.

Argued at February Term, 1882, before Beasley, Chief-Justice, and Justices Dixon, Reed, and Magie.

For the rule, *P. L. Voorhees.*

Contra, Mr. Richards, of New York.

Dixon, J. This suit was brought to recover damages for the destruction of growing wood by fire alleged to have been communicated from an engine of the defendant. The plaintiff having obtained a verdict for $1260, the defendant seeks a new trial.

. . . . . .

. . . The plaintiff's evidence was to the effect that on May 3, 1880, at half-past seven o'clock, A. M., a train of the defendant passed Mount Pleasant Station, going northwesterly, at about forty miles an hour; that five minutes afterwards another train of the defendant stopped at that station and then proceeded northwesterly; that the wind was then blowing moderately from the west, and that the ground was covered with dry leaves, and the herbage was dry; that in a few minutes after the last train left, fire was discovered about one hundred and fifty feet east of the track and eight hundred feet northwest of the station; that the defendant's station-agent and others spent an hour in putting it out, and thought they had succeeded; that about ten o'clock the wind freshened and continued to grow stronger until noon; that at eleven o'clock another train came from the northwest to the station, and within a few minutes thereafter flame was again seen at the easterly margin of the former fire, some three hundred and fifty feet east of the track, on the border of a wood. This fire, in spite of efforts to extinguish it, burned through continuous woods over some three hundred acres of the plaintiff's woodland, which lay about a mile from the station.

. . . . . .

The next ground taken is that the burning of the plaintiff's woods was not the proximate effect of the defendant's negligence. On this point the defendant urges that the second fire must have been but a fresh outbreak of the first: that this having been called to the attention of the tenant of the land on which it started, it was his duty to extinguish it if possible, and his failure to do so was negligence; that this negligence, having intervened between the defendant's negligence and the plaintiff's injury, broke the causal connection between them, and so relieved the defendant. The defect in this contention lies in the suggestion that the mere failure of a third person to extinguish the

[1] Only so much of the opinion is given as relates to one point. — Ed.

fire could be regarded as severing the train of causation between the defendant's fault and the injury. The rule of law requires that the damages chargeable to a wrong-doer must be shown to be the natural and proximate effects of his delinquency. The term "natural" imports that they are such as might reasonably have been foreseen, such as occur in an ordinary state of things; the term "proximate" indicates that there must be no other culpable and efficient agency intervening between the defendant's dereliction and the loss. *Cuff* v. *Newark & N. Y. R. R. Co.*, 6 Vroom, 17; *D., L. & W. R. R. Co.* v. *Salmon*, 10 Vroom, 299. (Now, the spread of the fire was a natural result of its kindling, and the failure to extinguish it was not, in any just sense, an efficient cause of its spreading; it was merely the absence of prevention. Although that failure might be culpable, yet it neither added to the original force nor gave it new direction, and hence, in tracing back the line of causation, it would not be noticed as a potent agency.) The nearest culpable cause was the escape of the spark from the engine. Hence on this point the defendant has not been injured.

Let the rule to show cause be discharged with costs.

ALEXANDER *v.* TOWN OF NEW CASTLE.

1888. 115 *Indiana*, 51.

From the Henry Circuit Court.

J. M. Brown, *R. Warner*, *C. S. Hernly*, and *S. H. Brown*, for appellant.

J. Brown, and *W. A. Brown*, for appellee.

Niblack, C J. This was an action brought by Harvey W. Alexander against the town of New Castle, for injuries alleged to have resulted from negligently permitting a sidewalk to be out of repair.

The first paragraph of the complaint charged that the town allowed a pit to be dug, or an excavation to be made, in the side of one of its streets, and wrongfully and negligently suffered and permitted such pit or excavation, with full knowledge of its dangerous character, to remain open and unin closed, whereby the plaintiff, without any fault on his part, fell into the same and was injured.

The second, and only other paragraph, contained some additional averments not material to any question involved in this appeal.

The town answered: First. In denial. Second.[1] That the plaintiff, as a special constable, was proceeding, under the sentence of a justice of the peace, to commit one Heavenridge to jail; and, in doing so, attempted to pass the pit or excavation in question; that, when

[1] The second answer is abridged. — Ed.

opposite the same, Heavenridge seized the plaintiff and threw him into the pit, whereby plaintiff was hurt and Heavenridge escaped from plaintiff's custody.

A demurrer to this second paragraph of answer, for the alleged insufficiency of its facts as a defence, was overruled, and a trial terminated in a verdict and judgment for the town, the defendant below.

Complaint is first made of the overruling the demurrer to the second paragraph of the answer, and this complaint is based upon the claim that, as the pit or excavation so wrongfully and negligently permitted to remain open and uninclosed afforded Heavenridge the opportunity of throwing the plaintiff into it as a means of escape, it was, in legal contemplation, the proximate cause of the injuries which the plaintiff received.

However negligent a person, or a corporation, may have been in some particular respect, he, or it, is only liable to those who may have been injured by reason of such negligence, and the negligence must have been the proximate cause of the injury sued for.

Where some independent agency has intervened and been the immediate cause of the injury, the party guilty of negligence in the first instance is not responsible. On that subject Wharton, in his work on the Law of Negligence, at section 134, says: "Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject-matter as to which I am not contractually bound. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured. I may be liable to him for my negligence in getting him into difficulty, but I am not liable to others for the negligence which he alone was the cause of making operative."

So, if a house has been negligently set on fire, and the fire has spread beyond its natural limits by means of a new agency; for example, if a high wind arose after its ignition, and carried burning brands to a great distance, thus causing a fire and a loss of property at a place which would have been safe but for the wind, the loss so caused by the wind will be set down as a remote consequence, for which the person setting the fire should not be held responsible. 1 Thompson, Negligence, 144.

Our cases are in harmony with the general principles herein announced. *Smith* v. *Thomas*, 23 Ind. 69; *Pennsylvania Co.* v. *Hensil*,

70 Ind. 569 (36 Am. R. 188); *City of Greencastle* v. *Martin*, 74 Ind. 449 (39 Am. R. 93); *Billman* v. *Indianapolis, &c. R. R. Co*, 76 Ind. 166 (40 Am. R. 230); *City of Crawfordsville* v. *Smith*, 79 Ind. 308 (41 Am. R. 612); *Terre Haute, &c. R. R. Co.* v. *Buck*, 96 Ind. 346 (49 Am. R. 168); *Bloom* v. *Franklin Life Ins. Co.*, 97 Ind. 478 (49 Am. R. 469); *Pennsylvania Co.* v. *Whitlock*, 99 Ind. 16 (50 Am. R. 71).

Heavenridge was clearly an intervening, as well as an independent, human agency in the infliction of the injuries of which the plaintiff complained. The Circuit Court, consequently, did not err in overruling the demurrer to the second paragraph of the answer.

[Other objections considered and overruled.]

Judgment affirmed.

VICARS *v.* WILCOCKS.

47 *George III.* 8 *East*, 1.

In an action on the case for slander, the plaintiff declared, that whereas he was retained and employed by one J. O., as a journeyman for wages, the defendant knowing the premises, and maliciously intending to injure him, and to cause it to be believed by J. O. and others that the plaintiff had been guilty of unlawfully cutting the cordage of the defendant, and to prevent the plaintiff from continuing in the service and employ of J. O., and to cause him to be dismissed therefrom, and to impoverish him; in a discourse with one J. M. concerning the plaintiff, and concerning certain flocking-cord of the defendant, alleged to have been before then cut, said that he (the defendant) had last night some flocking-cord cut into six yard lengths, but he knew who did it: for it was William Vicars; meaning that the plaintiff had unlawfully cut the said cord. And so it stated other like discourse with other third persons, imputing to the plaintiff that he had maliciously cut the defendant's cordage in his rope-yard. By reason whereof the said J. O., believing the plaintiff to have been guilty of unlawfully cutting the said flocking-cord, &c., discharged him from his service and employment, and has always since refused to employ him; and also one R. P., to whom the plaintiff applied to be employed, after his discharge from J. O., on account of the speaking and publishing the said slanderous words, and on no other account whatsoever, refused to receive the plaintiff into his service. And by reason of the premises the plaintiff has been and is still out of employ and damnified, &c.

It appeared at the trial, before Lawrence, J., at Stafford, that the plaintiff had been retained by J. O., as a journeyman, for a year, at certain wages, and that before the expiration of the year his master had discharged him, in consequence of the words spoken by the defendant. That the plaintiff afterwards applied to R. P. for employment, who re-

fused to employ him, in consequence of the words, and because his former master had discharged him for the offence imputed to him. The plaintiff was thereupon nonsuited, it being admitted that the words in themselves were not actionable, without special damage, and the learned judge being of opinion, that the plaintiff having been retained by his master, under a contract for a certain time then unexpired, it was not competent for the master to discharge him on account of the words spoken; but it was a mere wrongful act of the master, for which he was answerable in damages to the plaintiff; that the supposed special damage was the loss of those advantages which the plaintiff was entitled to under his contract with his master, which he could not in law be considered as having lost, as he still had a right to claim them of his master, who, without a sufficient cause, had refused to continue the plaintiff in his service. 2dly. With respect to the subsequent refusal of R. P. to employ the plaintiff, that it did not appear to be merely on account of the words spoken, but rather on account of his former master having discharged him in consequence of the accusation, without which he might not have regarded the words.

Jervis now moved to set aside the nonsuit, and urged that it was always deemed sufficient proof of special damage in these cases, to show that the injury arose, in fact, from the slander of the defendant, and it was not less a consequence of it because the act so induced was wrongful on the part of the master. He said that he could find no case where such a distinction was laid down, and that the practice of Nisi Prius was understood to be otherwise. 2dly. That the refusal of R. P. to employ the plaintiff was clear of that objection; and that such refusal had proceeded upon the alleged cause of discharge by the first master, and not upon the bare act itself of discharge.

Lord Ellenborough, C. J., said that the special damage must be the legal and natural consequence of the words spoken, otherwise it did not sustain the declaration; and here it was an illegal consequence, a mere wrongful act of the master, for which the defendant was no more answerable than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff, and thrown him into a horsepond, by way of punishment for his supposed transgression. And his lordship asked, whether any case could be mentioned of an action of this sort, sustained by proof only of an injury sustained by the tortious act of a third person. Upon the second ground, *non liquet* that the refusal by R. P. to employ the plaintiff was in consequence of the words spoken, as it is alleged to be; there was at least a concurrent cause, the act of his former master in refusing to continue him in his employ, which was more likely to weigh with R. P. than the mere words themselves of the defendant.

The other judges concurring,

Rule refused.

LYNCH, Plaintiff in Error, *v.* KNIGHT AND WIFE, Defendants in Error.

1861. 9 *House of Lords Cases*, 577.[1]

Error to the Irish Exchequer Chamber.

Mrs. Knight (her husband being joined for conformity as a plaintiff) brought an action to recover damages from Lynch for slander uttered by him to her husband, imputing to her that she had been almost seduced by Casserly before her marriage. The ground of special damage alleged was, that in consequence of the slander the husband forced her to leave his house and return to her father, whereby she lost the *consortium* of her husband.

The majority of the Law Lords *held* that the alleged ground of special damage was insufficient; the conduct of the husband not being (in their opinion) a natural and reasonable consequence of the slander.

Lord Wensleydale, who *held*, on another ground, that the action would not lie, differed from the other Lords as to the special damage. On that point his opinion was as follows: —

This view of the case makes it unnecessary to consider whether the slander of the defendant has been proved to be the cause of the loss — the desertion by the husband — so as to make the words actionable, they not being so unless they have caused a special damage. Upon this question I am much influenced by the able reasoning of Mr. Justice Christian. I strongly incline to agree with him, that to make the words actionable by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking the words, not what would reasonably follow, or we might think ought to follow.

I agree with the learned judges, that the husband was not justified in sending his wife away. I think he is to blame; but I think that such deliberate and continued accusations, of such a character, coming from such a quarter, might reasonably be expected so to operate, and to produce the result which they did.

In the case of *Vicars* v. *Wilcocks*, 8 East, 1, I must say that the rules laid down by Lord Ellenborough are too restricted. That which I have taken from Mr. Justice Christian seems to me, I own, correct. I cannot agree that the special damage must be the natural and legal consequence of the words, if true. Lord Ellenborough puts as an absurd case, that a plaintiff could recover damages for being thrown into

[1] The statement of facts has been much abridged. The arguments and most of the opinions are omitted. Only so much of the case is given as relates to the point in the extract from Lord Wensleydale's opinion. — Ed.

a horsepond, as a consequence of words spoken; but I own I can conceive that when the public mind was greatly excited on the subject of some base and disgraceful crime, an accusation of it to an assembled mob might, under particular circumstances, very naturally produce that result, and a compensation might be given for an act occurring as a consequence of an accusation of that crime.

Judgment reversed.

FERGUS LANE *v.* ATLANTIC WORKS.

1872. 111 *Massachusetts*, 136.[1]

Tort. The declaration was as follows: "And the plaintiff says that the defendants carelessly left a truck, loaded with iron, in Marion Street, a public highway in Boston, for the space of twenty minutes and more; and the iron on said truck was so carelessly and negligently placed that it would easily fall off; and that the plaintiff was walking in said highway, and was lawfully in said highway, and lawfully using said highway, and in the exercise of due care; and said iron upon said truck was thrown and fell therefrom upon the plaintiff in consequence of the defendants' carelessness, and the plaintiff was severely bruised and crippled," &c. The answer was a general denial of the plaintiff's allegations.

At the second trial in the Superior Court, before Devens, J., after the decision reported in 107 Mass. 104, the plaintiff introduced evidence that the defendants left a truck with a bar of iron on it standing in front of their works on Marion Street, which was a public highway in Boston; that the iron was not fastened, but would easily roll off the truck; that the plaintiff, then seven years old, and a boy about the same age named James Conners, were walking, between six and seven in the evening, on the side of Marion Street opposite the truck and the defendants' works; that Horace Lane, a boy twelve years old, being near the truck, called to them to come over and see him move it; that the plaintiff and Conners said they would go over and watch him do it; that they went over accordingly; that the plaintiff stood near the truck to see the wheels move, as Horace Lane took hold of the tongue of the truck; that Horace Lane moved the tongue somewhat; that the iron rolled off and injured the plaintiff's leg; and that neither the plaintiff nor Conners touched the iron or truck at all.

The jury were instructed as to what would make plaintiff a participator in the wrongful act of Horace Lane; and were also instructed, in substance, that plaintiff could not recover unless he was in the exercise

[1] The statement of the case has been much abridged. Only so much of the opinion is given as relates to one point. — Ed.

of the due and reasonable care that should be expected of a person of his age.

The defendants requested the Court to give the following instruction:

"While it is true that negligence alone on the part of Horace Lane, which contributed to the injury, combining with the defendants' negligence, would not prevent a recovery, unless the plaintiff's negligence also concurred as one of the contributory causes also; yet, if the fault of Horace Lane was not negligence, but a voluntary meddling with the truck or iron, for an unlawful purpose, and wholly as a sheer trespass, and this culpable conduct was the direct cause of the injury which would not have happened otherwise, the plaintiff cannot recover."

The Court did not give the ruling requested.

The following instructions, among others, were given: —

"If the sole or direct cause of the accident was the act of Horace Lane, the defendants are not responsible. If he was the culpable cause of the accident, that is to say, if the accident resulted from the fault of Horace Lane, they are not responsible. But if Horace Lane merely contributed to the accident, and if the accident resulted from the joint negligence of Horace Lane in his conduct in regard to moving the truck and the negligence of the defendants in leaving it there, where it was thus exposed, or leaving it so insecurely fastened that this particular danger might be reasonably apprehended therefrom, then the intermediate act of Horace Lane will not prevent the plaintiff from recovering, provided he himself was in the exercise of due and reasonable care." *Verdict for plaintiff.*

A. A. Ranney and *N. Morse*, for defendants.

W. G. Colburn, for plaintiff.

COLT, J. In actions of this description, the defendant is liable for the natural and probable consequences of his negligent act or omission. The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended.

The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrong-doer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise.

Whether in any given case the act charged was negligent, and whether the injury suffered was, within the relation of cause and effect, legally attributable to it, are questions for the jury. They present oftentimes difficult questions of fact, requiring practical knowledge and experience for their settlement, and where there is evidence to justify the verdict it cannot be set aside as matter of law. The only question for

the Court is, whether the instructions given upon these points stated the true tests of liability.

[Other points disposed of.]

3. The last instruction asked was rightly refused. Under the law as laid down by the Court the jury must have found the defendants guilty of negligence in doing that from which injury might reasonably have been expected, and from which injury resulted; that the plaintiff was in the exercise of due care; that Horace Lane's act was not the sole, direct, or culpable cause of the injury; that he did not purposely roll the iron upon the plaintiff; and that the plaintiff was not a joint actor with him in the transaction, but only a spectator. This supports the verdict. It is immaterial whether the act of Horace Lane was mere negligence or a voluntary intermeddling. It was an act which the jury have found the defendants ought to have apprehended and provided against. *McDonald* v. *Snelling*, 14 Allen, 290, 295; *Powell* v. *Deveney*, 3 Cush. 300; *Barnes* v. *Chapin*, 4 Allen, 444; *Tutein* v. *Hurley*, 98 Mass. 211; *Dixon* v. *Bell*, 5 M. & S. 198; *Mangan* v. *Atterton*, L. R. 1 Ex. 239; *Illidge* v. *Goodwin*, 5 C. & P. 190; *Burrows* v. *March Gas Co.*, L. R. 5 Ex. 67, 71; *Hughes* v. *Macfie*, 2 H. & C. 744.

Exceptions overruled.

HOLMES, J., IN CLIFFORD *v.* ATLANTIC COTTON MILLS.

1888. 146 *Massachusetts*, 47, pp. 48, 49.

HOLMES, J. There is no doubt that a man sometimes may be liable in tort, notwithstanding the fact that the damage was attributable in part to the concurrent or subsequently intervening misconduct of a third person. *Elmer* v. *Locke*, 135 Mass. 575, 576; *Lane* v. *Atlantic Works*, 111 Mass. 136; *Walker* v. *Cronin*, 107 Mass. 555; *Newman* v. *Zachary*, Aleyn, 3; *Scott* v. *Shepherd*, 2 W. Bl. 892; s. c. 3 Wils. 403; *Dixon* v. *Bell*, 5 M. & S. 198; *Clark* v. *Chambers*, 3 Q. B. D. 327; *Winsmore* v. *Greenbank*, Willes, 577 (see 21 Am. Law Rev. 765, 769); *Lynch* v. *Knight*, 9 H. L. C. 577, 590, 600; *Lumley* v. *Gye*, 2 El. & Bl. 216. See 1 Hale, P. C., 428; *Riding* v. *Smith*, 1 Ex. Div. 91, 94. But the general tendency has been to look no further back than the last wrongdoer, especially when he has complete and intelligent control of the consequences of the earlier wrongful act. See, for example, 111 Mass. 141; *Hastings* v. *Stetson*, 126 Mass. 329; *Clarke* v. *Morgan*, 38 L. T. (N. S.) 354; *Carter* v. *Towne*, 103 Mass. 507.

MARS *v.* DELAWARE & HUDSON CANAL COMPANY.

1889. 61 *New York Supreme Court* (54 *Hun*), 625.

APPEAL by defendant from a judgment in favor of plaintiff, entered upon the verdict of a jury.

Edwin Young, for the appellant.

Edwin Countryman, for the respondent.

PUTNAM, J. Plaintiff, while lawfully on a regular passenger train of defendant, on May 20, 1884, was injured by its collision with a "wild-cat" engine. The wild-cat engine was left that evening about 7 o'clock standing upon a side track, two tracks east of the down main track, upon which the collision occurred, with its fire banked, in charge of an employee (one McFarland) whose duty it was to keep water in the boiler and take general charge of it over night. About one A. M., McFarland left the engine standing upon said side-track and went north several hundred feet to a switch-shanty. While there the engine was moved in some way across several switches upon the south-bound main track, and the engine started north, backward, without lights and with no person upon it, at full speed. It ran about half a mile and collided with the train in question.

The action is founded on the defendant's alleged negligence in leaving its engine unattended on a side-track, and it is claimed that such negligence caused the injury to plaintiff for which the action is brought. It is not clear that the act of defendant in leaving its engine on its own premises, with its fire banked and where it could not go on to any main track without passing several switches, with a competent man in charge of it, and who appears only to have left it after it had stood six hours, and when not likely to start, was under any circumstances a negligent act. A party is only answerable, as for negligence, for omitting to provide against those dangers which might be reasonably expected to occur, such as might be foreseen by ordinary forecast. *Carpenter Case*, 24 Hun, 108. Could defendant, by ordinary forecast, have foreseen that this engine would be moved over two or three switches, across an intervening track, on to the south-bound track and sent flying northward? We, however, in our consideration of the case, assume that the jury were authorized to find that the act of defendant and its servants, in leaving this engine on the track unattended at the time mentioned, was negligence, and hence that if that negligent act was the cause, or proximate cause, of the injury to the plaintiff, the verdict given by the jury should be sustained.

The learned judge who presided at the trial charged that, if the engine was started from where it was placed by the employees of the defendant the night before, by some person not in the employ of defendant, and taken to the main track and sent northward, thus causing the accident, the defendant was not liable; but that if such act was

done by one of defendant's employees, though negligently or wilfully, defendant would be liable. And he refused to charge that if the act was done maliciously by one of the defendant's employees (except McFarland), defendant was not liable.

[Upon the evidence, the jury might have found that the engine was moved from where it was left and was sent northward by human agency. The act by whomsoever done, was a wicked, malicious, and criminal act, subjecting the offender to criminal punishment. Even if the person so moving the engine was an employee of the defendant, yet the defendant is no more responsible for the act than if it had been done by one not in its employ. The employee, in doing such an act, would not be regarded by the law as the agent of the defendant. If a servant goes outside of his employment, and without regard to his service, acting with malice or in order to effect some purpose of his own, wantonly causes damage to another, the master is not liable.[1]]

We think, therefore, that as it appeared, or the jury were authorized to find, that the engine was moved south to the main track, and then north, by some employee of defendant or other person maliciously, the defendant was entitled to have the jury instructed that if the engine was maliciously started by one of defendant's employees, other than McFarland, the defendant was not liable. Also, that the exception to the charge of the judge to the jury, that if the person who committed the act was an employee of the company, whether the act was done carelessly or wilfully, the defendant was not relieved of liability, was well taken, and hence that there should be a new trial unless the position taken by plaintiff, and next considered, is correct.

The plaintiff contends that, conceding the engine was moved maliciously by an employee of the defendant or other person, yet the negligent act of the defendant in leaving where it was a dangerous machine with fire in it, and without an attendant, was one of the concurring or proximate causes of the injury to the plaintiff, and hence that plaintiff was entitled to recover.

In *Williams* v. *Delaware, Lackawanna, & Western Railroad Company*, 39 Hun, 434, it is stated that "to entitle the plaintiff to recover upon the ground that defendant was guilty of negligence, in not furnishing a sufficient number of brakemen, it was incumbent on the plaintiff to show that his injury was the result of such negligence; that it was the natural and probable consequence of the defendant's omission, and that the accident would not have happened but for such omission." Wharton says: "Supposing that if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the

[1] The passages enclosed in [ ] are an abridgment of the opinion of the court on this branch of the case. — Ed.

interposition of independent responsible human action." Wharton's Law of Negligence, § 134. The negligent act which is the proximate cause of the injury is an act which naturally and probably would produce it. *Kerrigan* v. *Hart*, 40 Hun, 390, 391; *Williams' Case*, *supra*; *Ryan* v. *N. Y. C. R. R. Co.*, 35 N. Y. 210; *Lowery* v. *Manhattan Ry. Co.*, 99 id. 158; *Pollett* v. *Long*, 56 id. 200; *Hofnagle* v. *N. Y. C. & H. R. R. R. Co.*, 55 id. 608. That is, where the negligent act is the cause of the injury and where there is no intervening agency affecting or changing the operation of the primal cause. *Reiper* v. *Nichols*, 31 Hun, 495.

The injury to plaintiff, for which this action is brought, was not caused by the neglect of the defendant in leaving its car on the track. The injury was not the natural or ordinary result of such an act. It could not have been foreseen. Between the alleged negligence of defendant and the accident intervened a wilful, malicious, and criminal act of a third person, which caused the injury and broke the connection between defendant's negligence and the accident. In fact, some person stole defendant's engine and sent it flying up the track, and this wicked criminal act was the cause of the injury to the plaintiff, and defendant's act in leaving the engine where the criminal could start it was in no sense the proximate cause of the injury, or an act which ordinarily or naturally could have produced it.

Plaintiff has called our attention to a large number of cases bearing on the question discussed. We have examined those cases and do not think that any of them are quite parallel to this case. None of them held that where, between the negligent act and the injury, there intervened a wilful, malicious, and criminal act, which was the immediate cause of the injury, and where the injury was not the ordinary or probable result of the negligence complained of, and could not have been foreseen, that such negligence is the proximate cause of the injury.

In the cases cited by plaintiff it will be found that the injury was the natural, probable, or direct result of the negligent act. In the *Cohen Case*, 113 N. Y. 532, the injury was the direct result of the wrongful act of the city of New York, in allowing a person to keep a nuisance in the street. In *Lane* v. *Atlantic Works*, 111 Mass. 136, the Court put the decision on the ground "that the original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated. In *Illidge* v. *Goodwin*, 5 Carr. & P. 190, a horse and cart were left in the street without an attendant. A wrong-doer struck the horse, started him, and he did the injury complained of. But a horse standing in the street is liable to run away. It may become restless or frightened, or be started by a wrong-doer. The injury in that case was the natural and ordinary consequence of the neglect shown and should have been foreseen. That case is very briefly reported. It does not appear whether the striking of the horse was merely a negligent striking or a wilful act. If in that case some one had taken the reins and

driven the cart into another street, and started the horse on a run against another wagon on that street, the case would have been more like this.

The case before us (assuming that some person maliciously started the engine) might be deemed like that of a man who negligently left a loaded gun on his premises, accessible to the public, which some one took and with it injured another. Would the owner of the gun be liable for the injury? In *Binford* v. *Johnston*, 82 Ind. 428, it was held that the fact that some agency intervened between the original negligence and the injury, did not preclude a recovery if the injury was the natural and probable result of the original wrong. In the *Lowery Case*, 99 N. Y. 163, it was held, although the act of the driver intervened between the negligence of the defendant and the injury, that the act of the driver, in view of the exigencies of the case, whether prudent or otherwise, may well be considered as a continuation of the original act which was caused by the neglect of defendant. In the "Squib" case the intermediate parties were held to have acted mechanically in a sudden, convulsive act, so that the injury was in fact deemed caused by the original negligent act of the defendant. So we think that all the cases cited by the plaintiff will be found to differ from the case we are considering in the regard above suggested.

We think there should be a new trial. If such a state of facts appear on the retrial that the jury would be authorized to find that the engine started itself, without being set in motion by any human agency, found its way on to the main track, and thus caused the accident, we think the case would properly be submitted to the jury. Should it appear, however, that some wrong-doer criminally placed the engine on the south-bound track and started it northward, we are of the opinion that the defendant could not be held liable. In that case defendant could not be deemed negligent as to the plaintiff.

The judgment should be reversed and a new trial granted, costs to abide the event.

LEARNED, P. J., concurred.

LANDON, J. (dissenting): The case of *Lane* v. *Atlantic Works*, 111 Mass. 136, states very clearly the propositions governing this case. The injury must be the direct result of the misconduct charged, but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended. (The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrong-doer, if such act ought to have been foreseen.) Practical knowledge and experience are required for the determination of the question whether some such injurious interference and result ought to have been apprehended, and the verdict of the jury usually determines this question. Here the jury have answered the questions involved as follows: When the engine was abandoned it was reasonable to apprehend that some weak or wicked person would be tempted to set it in motion. A

jury of railroad superintendents would probably concur in that conclusion. If thus set in motion, injury was to be apprehended to whatever persons or property might then happen to be exposed. The plaintiff was exposed, and therefore injured.

I advise an affirmance of the judgment.

Judgment reversed, new trial granted, costs to abide event.

KEY, J., IN INTERNATIONAL &c. R. CO. *v.* JOHNSON.

1900. 23 *Texas Civil Appeals*, 160, pp. 203, 204.

KEY, J. . . . There appears to be some difference among courts and judges as to the care and precaution that should be used by railroad companies to prevent outside interference with their tracks and switches. Some declare that they are not required to anticipate and guard against wrongful and unlawful acts upon the part of trespassers, and may presume that there will be no unlawful interference with their tracks and switches. It is not believed that this proposition is sound.

It is a reasonable presumption, if not a matter of common knowledge, that railroads are owned and managed by men of intelligence and capacity; that they are familiar with past and current history and conditions; that they know evil-disposed persons do sometimes tamper with railroad tracks and switches, for the purpose of wrecking trains, and they must conduct their business and operate their trains with reference to these known facts. And it is believed that the degree of vigilance which they are required to exercise to guard against injuries resulting from unlawful interference with tracks and switches must be determined and regulated by the possibility and probability of such interference, and the grave consequences likely to result therefrom. They will not be permitted to close their eyes to conditions known to exist, and justify themselves upon the alleged right to presume that no person intends to commit a crime.

Suppose, during a railroad strike in Chicago or some other city, a threat by the strikers, made known to the railroad company, to tear up the railroad track near the city is put into execution, and the company makes no effort to prevent such interference or ascertain if it has occurred and warn approaching trains; and three hours thereafter an incoming train, unaware of such interference with the track, is wrecked by reason thereof. Could the company, when sued by either passenger or employee, escape liability upon the doctrine that it had the right to presume that the strikers would not violate the law, and was under no obligation to adopt measures to prevent unlawful interference with its track, or to ascertain that it had been so interfered with and warn the approaching train? Most assuredly it could not, because

the law would charge it with a knowledge of the fact that evil-disposed persons were threatening to tear up its track, although in so doing they might commit a felony. And, in such a case, the exercise of due care would require the railroad company either to protect its track from such unlawful interference, or to warn all approaching trains before or after the interference had occurred.

Of course, the illustration given differs materially from the case at bar, but it demonstrates the proposition that railroad companies have not the right, under all circumstances, to presume that no one will unlawfully interfere with their tracks. In fact, they have no such right at any time, it being a matter of common knowledge that railroad tracks are sometimes, without warning, tampered with by evil-disposed persons; and the true rule in determining the question of liability is, did the company exercise the proper care and vigilance to guard against injury resulting from such interference? And the degree of care and vigilance must be in proportion to the degree of probability of such interference and the harm likely to result therefrom.

In many instances, where railroads traverse many miles of sparsely inhabited territory seldom frequented by disreputable and lawless characters, in the absence of specific threats, there is less probability of such interference, and the degree of vigilance required to guard against it is correspondingly slight.

In the case at bar, the switch in question was located near the capital city of the State, where it is not unreasonable to suppose lawless characters sometimes drift. The record shows that appellant recognized its duty to guard the switch against outside interference, and instructed one of its employees to spike it down. Whether or not there was any special reason for apprehending such interference, the testimony does not inform us; but we believe that the jury were authorized to reach the conclusion that it was not made to appear from the testimony that appellant had exercised that degree of care to protect its track from defects caused by ordinary wear and tear, or by outside interference, that was imposed upon it by law, for the benefit and protection of deceased, and so believing, the verdict will not be set aside.

We are not to be understood as holding that it was the duty of the railroad company to constantly guard the switch; and we sustain the verdict mainly upon the theory that due care and vigilance was not shown to have been exercised to ascertain that the switch had been tampered with and warn the approaching train of the danger.

MATHEWS *v.* LONDON STREET TRAMWAYS CO.

1888. 60 *Law Times Reports, New Series*, 47.

Queen's Bench Division.

Before Pollock, B., and Manisty, J.

This was a motion on behalf of the plaintiff for a new trial on the ground of misdirection in an action, tried before Field, J., and a special jury, on the 22d June, 1888.

The action was brought to recover damages for injuries sustained by the plaintiff through the negligence of the defendants' servants, and the facts were as follows: —

The plaintiff was an outside passenger on an omnibus running from Highgate to Kentish Town. In descending a hill the omnibus overtook a handcart near the kerb, and in order to pass it pulled on to the tramway line. A tramcar was coming up the hill at the time, the driver of the tramcar pursued his course, and a collision took place, by reason of which the plaintiff was thrown off and suffered severe injuries.

The learned judge summed-up to the jury to the effect that, to find a verdict for the plaintiff, they must be satisfied that the accident which was the cause of the injuries he sustained occurred solely through the negligence of the defendants' servants, and that they should find a verdict for the defendants unless they were satisfied that the accident was due to the negligence of the defendants; and he refused to direct them that if they found that but for the negligence of both the defendants and the omnibus driver the accident would not have happened, then the verdict should be for the plaintiff; and refused to leave to the jury the question whether the accident did so happen.

The jury found for the defendants. The plaintiff moved to set aside the verdict on the ground above stated.

Kemp, Q. C., and *R. Vaughan Williams*, for the plaintiff.

It was the duty of both drivers to exercise care; if the driver of the omnibus was guilty of negligence in pulling on to the tramway line to pass the handcart, the driver of the tramcar ought to have stopped when he saw the omnibus in his way. [Pollock, B. — Did not the accident happen through the combined negligence of both drivers?] Since the case of *The Bernina*, 58 L. T. Rep. N. S. 423; 13 H. L. App. Cas. 1, the plaintiff is entitled to recover even if the driver of the omnibus was careless, provided the driver of the tramcar could have avoided the accident by exercising care, as a passenger is not identified with the negligence of the driver of an omnibus. The jury should have been asked whether the collision occurred, first, through the sole negligence of the driver of the tramcar; secondly, through the sole negligence of the driver of the omnibus; and lastly, through the joint negligence of both drivers. The learned judge was guided by the case of *Thorogood* v. *Bryan*, 8 C. B. 115, which was overruled by *The Bernina*, 58

L. T. Rep. N. S. 423; 13 App. Cas. 1, and did not leave the question of joint negligence to the jury.

Tindal Atkinson, Q. C., and *Atherley Jones*, for the defendants.

If the question of joint negligence had been left to the jury, it would have been irrelevant. The word "solely" comes in in the wrong place. Looking at the context the learned judge directed the jury to discard contributory negligence, as it would not prejudice the plaintiff's claim. [POLLOCK, B. — Is not "solely" an unfortunate word to have used?] The jury were distinctly told that the plaintiff would not be debarred from recovering owing to the negligence of the omnibus driver. The accident was caused by the negligence either of the omnibus driver or of the tramcar driver. The jury came to the conclusion that it was caused by the negligence of the omnibus driver, and there was no question of contributory negligence. "Solely" need not necessarily bear the interpretation put upon it by the plaintiff, and the learned judge may have meant that the jury were to treat the negligence of the tramcar driver, together with that of the omnibus driver, as solely that of the tramcar driver.

R. Vaughan Williams in reply. The learned judge asked the jury, after they had returned their verdict, whether the accident was caused by the negligence of both drivers, and so showed that he had not left the question of joint negligence to them.

POLLOCK, B. This is one of those cases in which the Court has a disagreeable task to perform, namely, to say whether the language of the learned judge was sufficient for the particular facts of the particular case before us. I think that the manner in which this case was left to the jury is not satisfactory, and that the verdict depending upon it ought not to be upheld. The facts of the case are as follows: The plaintiff was riding on the outside of an omnibus running from High gate to Kentish Town. In descending a hill the omnibus had to pass a handcart near the kerb, and in doing so pulled on to the tramway line. A tramcar was coming up the hill at the time, the driver of the tramcar pursued his course, and a collision took place. The old law, as decided in *Thorogood* v. *Bryan*, 8 C. B. 115, in 1849, was, that a person by selecting a particular conveyance so identified himself with it that, if an accident occurred in part caused by his own driver's negligence, although that driver was not his own selection, nor his own servant, the traveller, if injured, must be deemed to have been a contributory to his own injury by his own negligence, and could not recover. In the case of *Mills* v. *Armstrong and another; The Bernina*, 58 L. T. Rep. N. S. 423; 13 H. of L. App. Cas. 1, decided in the House of Lords in 1888, it was held (affirming the decision of the Court of Appeal) that the old law on the subject could not be sustained, and that the reasons on which the judgment in *Thorogood* v. *Bryan* was founded were inconclusive and unsatisfactory. That being so, the question for us to decide is, what was the proper summing-up to the jury? It is clear that, if facts in a case do arise which raise certain points of law, then it

is the duty of the judge to call the attention of the jury to the law as affecting the facts. It would have been impossible for the jury to have decided this case without having considered what part the omnibus driver had taken. The learned judge told them to discard the conduct of the omnibus driver, and I think that in doing so he was wrong. The judge went on to tell the jury that, to find a verdict for the plaintiff, they must be satisfied that the accident occurred solely through the negligence of the defendants. Mr. Vaughan Williams asked the learned judge to give the following further direction to the jury: "If the accident would not have happened but for the negligence of the omnibus driver and the tramcar driver, the plaintiff is entitled to the verdict." This direction does not appear to me to involve the proper question in this case. The learned judge refused to give this direction, but did ask the jury after they had returned their verdict, Would the accident have happened but for the negligence of both drivers? The jury said that they were unable to answer this question. This shows that the jury had not considered the question of joint negligence before returning their verdict. There is therefore vice in the verdict, which cannot be upheld.

Manisty, J. I am of the same opinion. This is a case which may frequently occur. The facts are very clear. The omnibus driver saw a handcart in front of him, and in order to avoid it he pulled on to the tramway line. The tramcar was thirteen yards off, and the driver went on, notwithstanding the fact that the omnibus was on the line. These facts raise two questions: (1) Was there negligence on the part of the omnibus driver? (2) Was there negligence on the part of the tramcar driver? It appears to me that it was the duty of the learned judge to give the jury the following direction: Was there negligence on the part of the tramcar driver which caused the accident? If so, it is no answer to say that there was negligence on the part of the omnibus driver. The learned judge did say: If the defendants' servants were the sole cause of the injury, and if their negligence was the cause of the accident, find for the plaintiff. I do not understand the direction which Mr. Vaughan Williams wished the judge to give the jury. The learned judge told the jury three times not to find for the plaintiff unless they thought that the defendant was solely liable. The verdict, to my mind, is unsatisfactory and there must be a new trial.

Order for a new trial.

PASTENE *v.* ADAMS.

1874. 49 *California*, 87.[1]

Appeal from the District Court, Twelfth Judicial District, City and County of San Francisco.

[1] Portions of the arguments are omitted. — Ed.

The defendants were lumber dealers in the city of San Francisco, and had a lumber yard on the easterly side of Stewart Street, between Howard and Folsom streets. Their office fronted on the east side of Stewart Street, which runs north and south, and there were two gangways or roads leading from the street into the lumber yard, one on the north side of the office and one on the south, each about twelve feet wide. The distance between these gangways was about thirty-five feet. In front of the office, and in Stewart Street, and between the gangways, the defendants had piled three tiers of timbers, about twelve inches square. The ends of these timbers extended to the gangways, but they were so laid, one upon another, that the ends of some projected more than others. The plaintiff went to the defendants' office to purchase lumber, and started from the office with a clerk, to walk down Stewart Street, alongside of the timbers to the gangway. While walking close to the timbers, one Randall drove a team from the yard through the gangway to the street, and in doing so, the wheel caught the end of one of the timbers and threw it down. The plaintiff's leg sustained such an injury as to render amputation necessary. This action was brought to recover damages for the injury he thus sustained. There was an issue made in the pleadings as to whether the timbers were carelessly piled. The timbers had lain there for several months. The jury gave a verdict for the plaintiff for two thousand dollars damages, and the defendants appealed.

W. H. Patterson and *Wm. Irvine*, for the appellants.

The entire case made by the plaintiff's proofs rested upon the legal proposition upon which the action was based, that the act of piling the timber in the roadway by the defendants made them responsible for any consequences of injury resulting therefrom, however remotely, and though directly occasioned by the act of another; which proposition, we submit, cannot be maintained.

The following cases demonstrate the rule that the injury must have been immediately occasioned by the act of imputed negligence, or the result would have been the natural or necessary consequence thereof: *Ryan* v. *New York Central Railroad Co.*, 35 New York R. 210; *Penn. Railroad Co.* v. *Kerr*, 62 Penn. (State) R. 353, 364; *Denny* v *New York Central Railroad Co.*, 13 Gray (Mass.), R. 481; *Railroad Co.* v. *Reeves*, 10 Wallace (U. S.) R. 176; *Morrison* v. *Davis*, 20 Penn. (State) R. 171; *Griggs* v. *Fleckenstien*, 14 Minnesota R. 81–89.

The doctrine of these authorities is that the defendant is only responsible for the natural and proximate, and not for the remote consequences following from his acts. If a subsequent and distinct cause, intervening after that for which the defendant is responsible, had ceased to act, has been productive of injury, and but for that no injury would have occurred, the defendant is not responsible.

R. W. Hent and *H. L. Joachimsen*, for the respondent.

The defendants furnished the means and facility for the commission of the injury to the plaintiff.

Both the negligence of defendants in piling lumber into the street, and allowing it to remain there, and their negligent manner of piling it where it was, if not the sole, or in point of time the immediate, causes of the injury complained of, concurred with the driving of Randall's team to produce the injury, and defendants are, therefore, responsible; it clearly appearing that, but for such negligence, the injury would not have happened, and both circumstances being closely connected with the injury in the order of events. Shear. & Red. on Neg., sec. 10, and authorities cited in note 2.

The fault of a mere stranger, however much it may contribute to the injury, is no defence for one whose negligence helped to bring the injury about. Shear. & Red. on Neg., secs. 27, 46.

By the Court, McKINSTRY, J. If the timbers were negligently piled by the defendants, the negligence continued until they were thrown down, and (concurring with the action of Randall) was a direct and proximate cause of the injury sustained by the plaintiff.

Judgment affirmed.

HOGLE *v.* NEW YORK CENTRAL, &c. RAILROAD COMPANY.

1882. 28 *Hun* (35 *New York Supreme Court*), 363.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury, and from an order denying a motion for a new trial, made upon the minutes of the justice before whom the action was tried.

The action was brought to recover damages for injury to the plaintiff's woods, occasioned by a fire alleged to have been caused by the negligence of the defendant in the management and construction of its engines.

S. W. Jackson, for the appellant.

D. M. Chadsey, for the respondent.

BY THE COURT. The Court was requested by the defendant to charge that when the plaintiff discovered the fire, if he neglected to use reasonably practicable means to suppress it, he could not recover for subsequent damages. The Court refused, holding that as the plaintiff was not at fault in the origin of the fire, he was not bound to make any effort to suppress it. We think that this was erroneous. Let us suppose that the plaintiff has seen a little spark of fire beginning to spread among dry leaves; that he could have put it out with a stamp of his foot; but that he knowingly neglected to do this, and thus permitted the fire to extend until it destroyed several acres of his woods. Would it be

just that he should make the defendant pay all the damages he had suffered? Clearly not. It may be that he would not be bound to use every possible effort to suppress the fire. But the language of the request was well chosen. He should do what was reasonably practicable. To say that he need not do what he reasonably could to suppress the fire is not very far from saying that he might do what he could to increase it. The wrong done by the defendant was not intentional. And if it were in the plaintiff's power, by reasonable efforts, to prevent the increase of the wrong, he should use that power. *Bevier* v. *D. & H. C. Co.*, 13 Hun, 254; *Milton* v. *Hudson R. Steamboat Co.*, 37 N. Y. 214.

This is analogous to the rule which requires the innocent party to a broken contract of hire of services to earn what he can in other ways, and thus diminish the damages to be paid by the other party.

The judgment must be reversed and a new trial granted, costs to abide the event.

Judgment and order reversed, new trial granted, costs to abide event.

LOKER *v.* DAMON.

1835. 17 *Pickering*, 284.[1]

Trespass *quare clausum*. The declaration set forth, that the defendants destroyed and carried away ten rods of the plaintiff's fences, in consequence of which certain cattle escaped through the breach and destroyed the plaintiff's grass, and that he thereby lost the profits of his close from September, 1832, to July, 1833.

At the trial before Morton, J., the plaintiff proved, that the defendants, in the latter part of November, removed portions of the stone wall inclosing the *locus*, and thus made a passageway through it; that these breaches were not repaired till after the middle of the succeeding May, when they were closed up by the plaintiff; and that in the mean time, the cattle of the plaintiff and others passed into the close, and fed upon the grass; that the close contained four or five acres; and that in 1832, it produced about a ton of hay to the acre. The close was a part of the farm on which the plaintiff lived.

A default was entered, the damages to be assessed at $1.50, unless the Court should be of opinion, that the plaintiff could recover damages beyond a remuneration for replacing the fences; in which case the damages were to be assessed upon such principles as the Court should determine.

Josiah Adams and *Keith* for defendants.

Mellen, for plaintiff.

[1] Only so much of the case is given as relates to the measure of damages. — Ed.

SHAW, C. J. The Court are of opinion, that the direction respecting damages was right. In assessing damages, the direct and immediate consequences of the injurious act are to be regarded, and not remote, speculative, and contingent consequences, which the party injured might easily have avoided by his own act. Suppose a man should enter his neighbor's field unlawfully, and leave the gate open; if, before the owner knows it, cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open and passes it frequently, and wilfully and obstinately or through gross negligence leaves it open all summer, and cattle get in, it is his own folly. So if one throw a stone and break a window, the cost of repairing the window is the ordinary measure of damage. But if the owner suffers the window to remain without repairing a great length of time after notice of the fact, and his furniture, or pictures, or other valuable articles, sustain damage, or the rain beats in and rots the window, this damage would be too remote. We think the jury were rightly instructed, that as the trespass consisted in removing a few rods of fence, the proper measure of damage was the costs of repairing it, and not the loss of a subsequent year's crop, arising from the want of such fence. I do not mean to say, that other damages may not be given for injury in breaking the plaintiff's close, but I mean only to say, that in the actual circumstances of this case, the cost of replacing the fence, and not the loss of an ensuing year's crop, is to be taken as the rule of damages, for that part of the injury which consisted in removing the fence and leaving the close exposed.

Judgment on the default, for the sum of $1.50 *damages.*

CHAPTER II.

WHEN BREACH OF STATUTORY DUTY AFFORDS BASIS FOR AN ACTION OF TORT.

WILLY *v.* MULLEDY.

1879. 78 *New York*, 310.[1]

EARL, J. This is an action to recover damages for the death of plaintiff's wife, alleged to have been caused by the fault of the defendant. Prior to the 1st day of November, 1877, the plaintiff hired of the defendant certain apartments in the rear of the third story of a tenement house in the city of Brooklyn, and with his wife and infant child moved into them on that day. On the fifth day in the same month, in the day-time, a fire took place, originating in the lower story of the house, and plaintiff's wife and child were smothered to death.

It is claimed that the defendant was in fault because he had not constructed for the house a fire-escape, and because he had not placed in the house a ladder for access to the scuttle.

Section 36 of title 13 of chapter 863 of the Laws of 1873 provides that every building in the city of Brooklyn shall have a scuttle or place of egress in the roof thereof of proper size, and "shall have ladders or stairways leading to the same; and all such scuttles and stairways or ladders leading to the roof shall be kept in readiness for use at all times." It also provides that houses like that occupied by the plaintiff "shall be provided with such fire-escapes and doors as shall be directed and approved by the commissioners (of the department of fire and buildings); and the owner or owners of any building upon which any fire-escapes may now or hereafter be erected, shall keep the same in good repair and well painted, and no person shall at any time place any incumbrance of any kind whatsoever upon said fire-escapes now erected or that may hereafter be erected in the city. Any person, after being notified by said commissioners, who shall neglect to place upon any such building the fire-escape herein provided for, shall forfeit the sum of $500, and shall be deemed guilty of a misdemeanor."

Under this statute the defendant was bound to provide this house with a fire-escape. He was not permitted to wait until he should be directed to provide one by the commissioners. He was bound to do it in such way as they should direct and approve, and it was for him to procure their direction and approval. No penalty is imposed for the

[1] Arguments omitted. Only so much of the opinion is given as relates to a single point. — ED.

simple omission to provide one. The penalty can be incurred only for the neglect to provide one after notification by the commissioners.

Here was, then, an absolute duty imposed upon the defendant by statute to provide a fire-escape, and the duty was imposed for the sole benefit of the tenants of the house, so that they would have a mode of escape in the case of a fire. For a breach of this duty causing damage, it cannot be doubted that the tenants have a remedy. It is a general rule, that whenever one owes another a duty, whether such duty be imposed by voluntary contract or by statute, a breach of such duty causing damage gives a cause of action. Duty and right are correlative; and where a duty is imposed, there must be a right to have it performed. When a statute imposes a duty upon a public officer, it is well settled that any person having a special interest in the performance thereof may sue for a breach thereof causing him damage, and the same is true of a duty imposed by statute upon any citizen: (Cooley on Torts, 654; *Hover* v. *Barkhoff*, 44 N. Y. 113; *Jetter* v. *N. Y. C. and H. R. R. R. Co.*, 2 Abb. Ct. of App. Dec. 458; *Heeney* v. *Sprague*, 11 R. I. 456; *Couch* v. *Steele*, 3 Ell. & Bl. 402). In Comyn's Digest, *Action upon Statute* (F.) it is laid down as the rule that "in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law."

[Remainder of opinion omitted.]

Judgment for plaintiff affirmed.

ALDRICH *v.* HOWARD.

1862. 7 *Rhode Island*, 199.[1]

AMES, C. J. The question raised by this demurrer is, whether the fourth and fifth counts of the declaration state a cause of action. They allege, in substance, that the defendant, by the erection of a large wooden building, constructed in violation of a statute of the State regulating the erection of buildings within what are called the fire limits of the City of Providence, has so increased the risk from fire to the plaintiff's dwelling house, stores, and hotel, next adjoining, that he has been unable to rent the same, and has been obliged to pay greatly enhanced rates, to insure them. The plaintiff, as an adjoining proprietor, is certainly within the protection of the act, which regulates with minuteness the mode of building in reference to the safety of the houses of such proprietors from fire, and has stated, in these counts, a special pecuniary loss consequent upon the defendant's ille-

[1] Statement and arguments omitted. — ED.

gal act, for which the public prosecution of the defendant can afford no redress. The special damage alleged is not, as claimed by the defendant, remote or contingent, but present, actual, and directly consequent upon the defendant's violation of law. As stated, it is peculiar to the plaintiff as an adjoining proprietor, and in excess of the injury sustained by the public, whose interests are also intended to be guarded by the act from the effects of devastating fires. In these respects, the cause of action set forth in these counts not only falls within the general rule, relating to actions of the case as derived from the equity of the statute of Westm. 2d, but within that more special rule, so long ago laid down by Lord Holt, that "in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of the wrong done to him contrary to the said law." 1 Com. Dig., Action upon Statute, F; Ib., Action upon the Case, A; *Couch* v. *Steel*, 3 Ellis and Blackburn (77 Eng. C. L. R.), 411, per Lord Campbell, C. J.

As we construe this statute, it imposes upon one erecting a building within the fire limits of Providence the duty, in respect to adjoining proprietors and the public, of building it in the manner, of the materials, and of the size prescribed by the act. The prohibition is imperative upon him, if he builds at all, to build as the act prescribes, and in no other manner; and quite as effectually imposes upon him the legal duty of so building, as if the statute had expressed the duty in an affirmative form. The eighth and ninth sections, which fix the pecuniary penalties for disobedience of the former sections, so far from licensing the violation of the statute upon the terms of paying the penalties, were designed simply to punish the violator according to the degree of his offence and his persistency in it, and thus to compel a compliance with the law as enacted. They are divided, when recovered, between the city and the State; and not a penny of them given in recompense to a party specially damaged. They are recoverable for the public injury, whether any one be specially damaged or not. The statute does not, as in some of the cases cited, in creating the offence, notice also the private injury, and through the penalties, give the private recompense. Had it done so, there would have been some reason for confining the party injured to the statute compensation, however inadequate it might seem to be. As it is, the party specially injured has no redress unless by the equity of the old statute of Westminster 2d, — designed to afford a remedy for every wrong not redressed by any of the formed actions of the common law, if an action of the case can afford it. We have no doubt that when a statute makes the doing or omitting any act illegal, and subjects the offending parties to penalties for the public wrong only, a party specially injured by the illegal act or omission has the right of suing therefor at the common law. *Couch* v. *Steel*, *sup.*; *Steam Navigation Co.* v. *Morrison*, 13 Common Bench (4 J. Scott), (76 Eng C. L. R.) 581,

594, per Williams, J.; *Caswell* v. *Worth*, 5 Ellis and Blackburn (85 Eng. C. L. R.), 848, 855, 856, per Coleridge, J.

The fourth and fifth counts of the declaration are maintained, and the pleas thereto overruled.

BRATTLEBORO *v.* WAIT.

1872. 44 *Vermont*, 459.

ACTION ON THE CASE, to recover damages sustained by reason o the defendant's neglect and refusal to comply with the requirements of § 39, ch. 83 of the General Statutes, and § 1 of No. 6 of the acts of the legislature of 1865. Demurrer to the declaration by the defendant.

The court, September term, 1870, BARRETT, J., presiding, sustained the demurrer, and rendered judgment for the defendant. Exceptions by the plaintiff.

C. N. Davenport, for the plaintiff.

H. E. Stoughton, for the defendant.

The opinion of the court was delivered by —

ROSS, J. The question in this case is whether the defendant as cashier of the Windham County Bank for the years commencing April 1, 1864, and April 1, 1865, and of the First National Bank of Brattleboro for the years commencing April 1, 1866, and April 1, 1867, is liable for any loss that may have resulted to the town, by his neglect to return to the town clerk of the plaintiff, for the first two years named, the names of the stockholders in the Windham County Bank, agreeably to the requirements of § 39, ch. 83 of the General Statutes, and for the last two years the names of the stockholders of the First National Bank of Brattleboro, agreeably to the requirements of § 1, of No. 6 of the acts of 1865; or whether the penalties imposed by § 47 of ch. 83, and by § 5 of the act of 1865, are the only remedies given for the neglect of the defendant to perform the duties imposed by the two sections first above named.

These duties are created solely by the statutes named, and by them are super-imposed upon the defendant in addition to those duties which were incumbent on him by reason of his acceptance of the office of cashier. The principle, that the law will furnish a remedy to a party injured by the neglect or non-performance of a duty imposed on an individual by statute, where the statute itself furnishes no remedy, is too familiar and well established to need the support of authorities. If the statute which imposes a new duty also provides a particular remedy, that remedy is usually the only remedy the injured party has. In *Regina* v. *Wigg*, 2 Salk. 460, the court says: "Where a new penalty is applied for a matter which at common law was an indictable offence, either remedy may be pursued; but where the statute makes

the offence, that remedy must be taken which the statute gives." Lord MANSFIELD, in *Rex* v. *Robinson*, 2 Bur. 799, stating the doctrine more fully, says: "The true rule of distinction seems to be, that where the offence intended to be guarded against was punishable before the making of such statute, prescribing a particular method of punishing it, there such particular remedy is cumulative, and does not take away the former remedy; but where the statute only enacts 'that the doing any act not punishable before, shall for the future be punishable in such and such a particular manner there,' it is necessary that such particular method, by such act prescribed, must be specifically pursued, and not the common law method of an indictment." The doctrine stated in these early leading cases is as applicable to civil as to criminal prosecutions. The question then is, was the penalty or forfeiture of $100 provided for by § 47, ch. 83 of the General Statutes, and of $500 provided for in § 5 of the act of 1865, intended for the remedies to the plaintiff for the non-performance by the defendant of the duties imposed by § 39, and by § 1. We think they were. The penalties under these statutes are given to the town, as the party injured or aggrieved by the failure of the defendant to perform the duties imposed, as has been held in *Newman, Treasurer of Brattleboro*, v. this defendant, 43 Vt. 587, in which the plaintiff through its treasurer sought to recover the penalty imposed by § 5 of the act of 1865, for the defendant's failure to comply with § 1 of that act during the years 1866 and 1867. It is unnecessary to repeat what has been said in that case. It would be inconsistent with the principle we have already stated, to hold that the plaintiff can recover the penalty as the party aggrieved, and also all damages it has sustained by the defendant's failure to perform a duty wholly imposed upon him by the statute. Such holding would give the plaintiff a double remedy for the same failure by the defendant to perform a duty imposed by statute, and due to the plaintiff only by the force of the statute; the penalty prescribed, and an amercement in damages for all the plaintiff can show he has suffered from such failure. The penalty cannot be held to be a cumulative remedy; for before the passage of the act no duty was due from the defendant as cashier to the plaintiff, and, therefore, there could be no remedy, and nothing for the penalty to be cumulative to. Such holding would interpret one and the same act as giving a double remedy, which is contrary to all rules of interpretation, and only allowable when it is given in express terms by the statute.

The judgment of the county court is affirmed.

KNUPFLE, Administrator, Respondent, v. KNICKERBOCKER ICE CO., Appellant.

1881. 84 *New York*, 488.[1]

Per Curiam. One of the principal questions litigated upon the trial of this action related to the alleged negligence of the driver of the defendant's team in leaving the horses untied in the street, which, it was claimed, was the cause of the death of the intestate. Among other evidence to establish such negligence, the plaintiff offered and introduced in evidence, against the objection of the defendant, an ordinance of the city of Brooklyn, prohibiting the leaving of any horse or horses attached to a vehicle standing in any street without a person in charge, or without being secured to a tying post We think there is no question as to the admissibility of such testimony under the decisions of this court, and the exception taken to the ruling in this respect cannot be upheld.

A more serious question arises as to the effect to be given to the evidence referred to. At the close of the charge the plaintiff's counsel requested the judge to charge the jury that a violation of an ordinance of the city is necessarily negligence; and the judge replied: "It is; I have so told the jury; it is negligence;" and the defendant's counsel excepted. We think there was error in the charge thus made, and that the judge went too far in holding that a violation of the ordinance was negligence of itself.

The question presented has been the subject of consideration in this court, as will be seen by reference to the reported cases. In *Brown* v. *B. & State Line R. R. Co.*, 22 N. Y. 191, the court charged the jury that if the injury occurred while defendant's train was running in violation of a city ordinance and at a rate of speed forbidden by it, and was occasioned by or would not have occurred except for such violation, the defendant was liable, and this direction was held to be error. This doctrine is, however, repudiated in *Jetter* v. *N. Y. & H. R. R. Co.*, 2 Abb. Ct. App. Dec. 458, as well as in subsequent cases. In the last case cited it was held that a party in doing a lawful act, where there is no present danger, or appearance of danger, has a right to assume that others will conform their conduct to the express requirements of the law and not bring injury upon him by its violation. It is also strongly intimated that a violator of such an ordinance is a wrong-doer and necessarily negligent, and a person injured thereby is entitled to a civil remedy. The distinct point now raised was not, however, fairly presented by the charge to which exception was taken, which was not otherwise erroneous. In *Beisegel* v. *N. Y. C. R. R. Co.*, 14 Abb. Pr. [N. S.] 29, it was held that it was some evidence of negligence to show that an ordinance was violated, and the charge of

[1] Statement and arguments omitted. — Ed.

the judge upon the trial to that effect was upheld. In *McGrath* v. *N. Y. C. & H. R. R. R. Co.*, 63 N. Y. 522, it was laid down that the violation or disregard of an ordinance, while not conclusive evidence of negligence, is some evidence for the consideration of the jury. In *Massoth* v. *D. & H. Canal Co.*, 64 N. Y. 524, the cases are reviewed, and it was said to be an open question in this court whether the violation of a municipal ordinance was negligence *per se*; and it was held that the city ordinance being submitted to the jury with the other evidence as bearing upon the question, but not as conclusive, there was no error in the parts of the charge excepted to. The result of the decisions, therefore, is, that the violation of the ordinance is some evidence of negligence, but not necessarily negligence. The judge not only assented unqualifiedly to the request made, but he also said that it was negligence; and thus went further than to hold, within the cases cited, that it was evidence of negligence.

The counsel for the plaintiff urges that even if erroneous, the charge worked defendant no injury. This position is based upon the theory that as the question was submitted to the jury as one of fact, whether the team was left loose and unattended, and as the judge had charged that the ordinance adds very little to what would have been the rule without it, and that it was negligence to leave a horse untied or not in charge of some one, in a public street, whether there is an ordinance or not, they must have found that they were so left, and, therefore, the plaintiff was entitled to a verdict. The difficulty about this position is, that the question, whether leaving the horses untied was negligence, was one of fact depending upon the circumstances attending the case, and while the jury may have found in favor of the defendant as to this, their verdict may have resulted from the charge made as to the effect of the ordinance. It cannot, therefore, be said that by the portion of the charge which has been considered the defendant was not prejudiced.

For the error in the charge, without considering the other questions raised, the judgment should be reversed and a new trial granted, costs to abide event.

All concur, except MILLER and DANFORTH, JJ., dissenting, and RAPALLO, J., absent.

Judgment reversed.

OSBORNE *v.* McMASTERS.

1889. 40 *Minnesota*, 103.

APPEAL by defendant from a judgment of the District Court for Ramsey County, where the action was tried before Kelly, J., and a jury, and a verdict rendered for plaintiff.

Flandrau, Squires & Cutcheon, for appellant.

M. D. Munn, for respondent.

MITCHELL, J.[1] Upon the record in this case it must be taken as the facts that defendant's clerk in his drug-store, in the course of his employment as such, sold to plaintiff's intestate a deadly poison without labelling it "Poison," as required by statute; that she, in ignorance of its deadly qualities, partook of the poison, which caused her death. Except for the ability of counsel and the earnestness with which they have argued the case, we would not have supposed that there could be any serious doubt of defendant's liability on this state of facts. It is immaterial for present purposes whether section 329 of the Penal Code or section 14, *c.* 147, Laws 1885, or both, are still in force, and constitute the law governing this case.[2] The requirements of both statutes are substantially the same, and the sole object of both is to protect the public against the dangerous qualities of poison. It is now well settled, certainly in this state, that where a statute or municipal ordinance imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty he is liable to those for whose protection or benefit it was imposed for any injuries of the character which the statute or ordinance was designed to prevent, and which were proximately produced by such neglect. In support of this we need only cite our own decision in *Bott* v. *Pratt*, 33 Minn. 323 (23 N. W. Rep. 237).

Defendant contends that this is only true where a right of action for the alleged negligent act existed at common law; that no liability existed at common law for selling poison without labelling it, and therefore none exists under this statute, no right of civil action being given by it. Without stopping to consider the correctness of the assumption that selling poison without labelling it might not be actionable negligence at common law, it is sufficient to say that, in our opinion, defendant's contention proceeds upon an entire misapprehension of the nature and gist of a cause of action of this kind. The common law gives a right of action to every one sustaining injuries caused proximately by the negligence of another. The present is a common-law action, the gist of which is defendant's negligence, resulting in the death of plaintiff's intestate. Negligence is the breach of legal duty. It is immaterial whether the duty is one imposed by the rule of common law requiring the exercise of ordinary care not to

1 Gilfillan, C. J., because of affinity to one of the parties, took no part in this case.

2 "A person who sells, gives away, or disposes of, any poison, or poisonous substance, without attaching to the vial, box, or parcel containing such poisonous substance, a label, with the name and residence of such person, the word 'poison,' and the name of such poison, all written or printed thereon, in plain and legible characters, is guilty of a misdemeanor." — Minnesota Penal Code, section 329.

"No person shall sell at retail any poisonous commodity recognized as such, and especially" [here enumerating various poisons], "without affixing to the box, bottle, vessel or package containing the same, and to the wrapper or cover thereof, a label bearing the name 'poison' distinctly shown, together with the name and place of business of the seller. . . . Any person failing to comply with the requirements of this section shall be termed guilty of a misdemeanor, and shall be liable to a fine of not less than five (5) dollars for each and every such omission." — Minnesota Laws, 1885, chap. 147, section 14 — ED.

injure another, or is imposed by a statute designed for the protection of others. In either case the failure to perform the duty constitutes negligence, and renders the party liable for injuries resulting from it. The only difference is that in the one case the measure of legal duty is to be determined upon common-law principles, while in the other the statute fixes it, so that the violation of the statute constitutes conclusive evidence of negligence, or, in other words, negligence *per se*. The action in the latter case is not a statutory one, nor does the statute give the right of action in any other sense except that it makes an act negligent which otherwise might not be such, or at least only evidence of negligence. All that the statute does is to establish a fixed standard by which the fact of negligence may be determined. The gist of the action is still negligence, or the non-performance of a legal duty to the person injured.

What has been already said suggests the answer to the further contention that if any civil liability exists it is only against the clerk who sold the poison, and who alone is criminally liable. Whether the act constituting the actionable negligence was such on common-law principles, or is made such by statute, the doctrine of agency applies, to wit, that the master is civilly liable for the negligence of his servant committed in the course of his employment, and resulting in injuries to third persons.

Judgment affirmed.

HYDE PARK *v.* GAY.

1876. 120 *Massachusetts*, 589.[1]

TORT for running over and destroying fire hose laid across a railroad track.

A fire broke out on Sunday morning. The fire department of the plaintiff town, in order to extinguish the fire, laid several lines of hose across a railroad track. A locomotive engine and train of cars, belonging to defendant and under the management of his men, struck and damaged the hose. The running of the train by defendant was in violation of the statute regulating the observance of the Lord's day.

Defendant requested (*inter alia*) the following instructions: —

"2. That the fact that it was about three o'clock, on Sunday morning, that the accident happened, does not make the rights of the parties any different from what they would have been if it had happened at the same hour on any other morning."

"6. That under the circumstances of this case the defendant is not liable, unless the managers of the train were guilty of reckless and wanton misconduct in the management of the train."

[1] Statement abridged. Only so much of the case is given as relates to a single point. — ED.

The judge refused to give the above instructions, and instructed the jury, among other things, as follows: —

"The running of this train on the Lord's day was an unlawful act on the part of the defendant, and if such unlawful act or the negligence of the defendant was the cause of the injuries, the plaintiff may recover therefor, provided it was free from fault or negligence."

Verdict for plaintiff. Defendant excepted.

J. R. Bullard, for defendant.

N. B. Bryant (*W. H. H. Andrews* with him), for plaintiff.

COLT, J. [Omitting most of the opinion.] To the defendant's objection that the jury was permitted to find for the plaintiff, although the managers of the train were free from any fault except that of running a train on Sunday, it is sufficient to say that the instructions given plainly required the jury to find that the act of running the train on the Lord's day was the distinctive and direct cause of the injury complained of; and this is enough to support the action.

Exceptions overruled.[1]

[1] In *Pittsburgh, etc. R. Co.* plf. in error, v. *Hood*, 94 Fed. Rep. 618, A. D., 1899, the R. R. Co. constructed a railroad, upon city streets and a public landing, under authority of an ordinance which gave the right to operate only during the night-time and until 6 A. M. The ordinance expressly provides that "no cars shall be drawn on the track at any other hours." After 6 A. M. the R. R. Co. ran a train upon the track over the landing and city streets, where Hood was in charge of a two-horse wagon. A movement of the train was made, letting off steam and otherwise causing much noise. The horses were thereby frightened; and Hood, in endeavoring to control them, received injuries from which he died.

The R. R. Co. contended that the violation of the ordinance "is only evidence of negligence, which should have been submitted to the jury."

The Circuit Court of Appeals *held*, that the operation of the railroad during the daytime contrary to the provisions of the ordinance "was a violation of law, and constituted a nuisance;" also, that there was proximate causal connection between the wrongful operation of the railroad and the injury to Hood.

In the opinion CLARK, J., thus contrasts the present case with *Hayes* v. *R. R. Co.*, 111 U. S. 228, where there was an ordinance imposing on the R. R. Co. the duty of building a fence upon the line of its road: —

CLARK, J. (p. 625). "In that case" [*Hayes* v. *R. R. Co.*] "the liability of the defendant was put upon the ground of negligence in the omission of a duty imposed by ordinance, while the ground of liability in the case at bar is that of a public nuisance causing special injury. In that case the operation of the railway was permitted, and the mode of operation regulated, whereas in this case the use of the railway track at the time was expressly prohibited. The provision of law in that case went to the manner of operation, while in this it goes to and denies the right to operate at all. The distinction is between the prosecution of a lawful business in a negligent manner and the prosecution of a business prohibited by law. The breach of law in that case was an omission of duty imposed, and in this the commission of a wrong expressly prohibited. Whether, in the ordinary case, where the original act of the defendant is lawful or authorized by statute, negligence is the gist of the action or a necessary element, we are not required to decide, as the original act in the case at bar was clearly unlawful and wrongful." — ED.

HAMMOND *v.* THE VESTRY OF ST. PANCRAS.

1874. *Law Reports*, 9 *Common Pleas*, 316.[1]

DECLARATION alleging that a certain sewer and barrel drain were vested in the defendants, that the defendants did not keep the same properly cleansed, whereby they became choked up and overflowed with foul water which flowed into the premises of the plaintiff, doing damage there.

First plea, not guilty.

Section 72 of the Metropolis Local Management Act (18 & 19 Vict. chap. 120) enacts that every vestry and district board shall "cause the sewers vested in them to be constructed, covered, and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed, and emptied. . . ."

[The other material facts are stated in the opinion.]

A rule *nisi* having been obtained:

Powell, Q. C., showed cause.

Sir Henry James, Q. C., and *Beasley*, in support of the rule.

Cur. adv. vult.

BRETT, J. This rule was argued on Thursday last before my Brother Denman and myself. It was an action against the vestry of St. Pancras for damage sustained by the plaintiff, a publican residing in their district, in consequence of sewage matter having escaped from a sewer under their management into his cellar: and the action was sought to be maintained upon s. 72 of the Metropolis Local Management Act, 18 & 19 Vict. c. 120. It was contended on behalf of the plaintiff that that section imposed upon the defendants an absolute duty to keep the sewers properly cleared, cleansed, and emptied, and that, by reason of their neglect of that duty the overflow complained of ensued. On the part of the defendants it was insisted that s. 72 does not impose upon the vestry or district board an absolute duty to keep the sewers cleansed at all events, but only the duty of using all reasonable care and diligence to keep them in a proper and serviceable condition; and that, if a sewer be foul and uncleansed, but without any want of reasonable care and diligence on the part of the vestry, if they have done all that careful and prudent men could do, they are not liable for the consequences. At the trial a verdict passed for the plaintiff for 50*l.*, but leave was reserved to the defendants to move to enter a nonsuit if the court should be of opinion that, upon the evidence and on the findings of the jury, no liability attached to them. A rule *nisi* was obtained in pursuance of that leave, and also to arrest the judgment on the ground that the declaration disclosed no cause of action, negligence not being charged. Now,

[1] Statement abridged. Arguments omitted. — ED.

the material findings of the jury were, that a brick drain which passed under or near to the plaintiff's premises was stopped, but that the barrel drain in the street was not stopped; that the barrel drain was known to the vestry, but that the brick drain was not; that the existence of the brick drain might have been ascertained and known by the exercise of reasonable care and inquiry; that the fact that the brick drain was obstructed was not known to the defendants before the injury accrued; and that they could not by the exercise of reasonable care have known that it was obstructed.

It was contended on the part of the defendants that the fact that the brick drain existed was unknown to them absolved them from responsibility. But that seems to me to be answered by the finding of the jury that they might have ascertained its existence by the exercise of reasonable care and inquiry. Ignorance under the circumstances cannot excuse them. I think the case must stand as if the vestry had knowledge of the existence of the brick drain. Upon the facts and the findings we must assume that the brick drain was a "sewer"; and therefore we must take it that the defendants knew of the brick drain, and that the injury to the plaintiff happened through its not having been properly cleansed. Now, if the 72d section does throw upon the defendants an absolute duty or obligation to guarantee that the sewers shall be at all times kept cleansed, it follows that, if any injury arises to an individual from their not being so kept, the vestry are liable. The question therefore is, what is the proper construction of the Act of Parliament. That, as it seems to me, will dispose of both points; for, both turn upon the construction of s. 72. The declaration does not charge the defendants with having been guilty of negligence. It discloses no common-law liability in the defendants, and can only be a valid declaration if it can be supported upon the statute. The words of s. 72 are susceptible of either meaning, — that an absolute duty is cast upon the defendants, or that they are only bound to exercise due and reasonable care. What, then, is the proper rule of interpretation? The defendants are a public body having a duty imposed upon them by parliament to do a thing which even with the exercise of the utmost care and diligence may not always be capable of being done. It is obvious that circumstances may arise in which a sewer notwithstanding the exercise of reasonable care may be obstructed. The terms of the finding in this case assume that. The jury find in effect that the brick drain was obstructed, but that the obstruction was not known to the defendants and could not by the exercise of reasonable care have been known to them. It would seem to me to be contrary to natural justice to say that parliament intended to impose upon a public body a liability for a thing which no reasonable care and skill could obviate. The duty may notwithstanding be absolute: but, if so, it ought to be imposed in the clearest possible terms. The intention of the legislature is to be gathered from the language used and the subject-matter. Where the

language used is consistent with either view, it ought not to be so construed as to inflict a liability, unless the party sought to be charged has been wanting in the exercise of due and reasonable care in the performance of the duty imposed. According to my view of s. 72, therefore, the vestry or district board are not to be held liable for not keeping their sewers cleansed at all events and under all circumstances; but only where by the exercise of reasonable care and diligence they can and ought to know that they require cleansing, and where by the exercise of reasonable care and skill they can be kept cleansed. I therefore think the rule should be made absolute to enter a verdict for the defendants, and to arrest the judgment.

[Remainder of opinion of BRETT, J., is omitted; also the concurring opinion of DENMAN, J.]

Rule absolute.

ST. LOUIS, &c. RAILROAD COMPANY *v.* TAYLOR.

1908. 210 *United States*, 281.[1]

ERROR to the Supreme Court of Arkansas, where judgment was rendered in favor of Taylor, the original plaintiff.

Rush Taggart (*John F. Dillon* with him), for plaintiff in error.

S. R. Chew, for defendant in error.

MOODY, J.

. . . . . .

The plaintiff in error raises another question, which, for the reasons already given, we think is of a Federal nature. The evidence showed that draw bars which, as originally constructed, are of standard height, are lowered by the natural effect of proper use; that, in addition to the correction of this tendency by general repair, devices called shims, which are metallic wedges of different thickness, are employed to raise the lowered draw bar to the legal standard; and that in the caboose of this train the railroad furnished a sufficient supply of these shims, which it was the duty of the conductor or brakeman to use as occasion demanded. On this state of the evidence the defendant was refused instructions, in substance, that if the defendant furnished cars which were constructed with draw bars of a standard height, and furnished shims to competent inspectors and trainmen and used reasonable care to keep the draw bars at a reasonable height, it had complied with its statutory duty, and, if the lowering of the draw bar resulted from the failure to use the shims, that was the negligence of a fellow servant, for which the defendant was not responsible. In deciding the questions thus raised, upon which the courts have differed (*St. Louis & S.*

[1] Statement and arguments omitted. Only so much of the opinion is given as relates to a single point. — ED.

F. Ry. v. *Delk*, 158 Fed. Rep. 931), we need not enter into the wilderness of cases upon the common law duty of the employer to use reasonable care to furnish his employé reasonably safe tools, machinery and appliances, or consider when and how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common law duty of master to servant. The Congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that "no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard." There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body. It is said that the liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible. But this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than break down the rules of law. But when applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employé and of the public. Where an injury happens through the absence of a safe draw bar there must be hardship. Such an injury must be an irreparable misfortune to some one. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such a policy would be

intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words. We see no error in this part of the case. . . .

POLLOCK, C. B., IN CHAMBERLAINE *v.* CHESTER, &c., RAILROAD COMPANY.

1848. 1 *Exchequer*, 870, pp. 876–877.

POLLOCK, C. B. Where a statute prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act. It is incumbent on the party complaining to allege and prove that the doing of the act prohibited has caused him some special damage, some peculiar injury beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects by an infringement of the law. But where the act prohibited is obviously prohibited for the protection of a particular party, there it is not necessary to allege special damage. . . .

GORRIS *v.* SCOTT.

1874. *Law Reports*, 9 *Exchequer*, 125.[1]

DECLARATION, first count: that after the passing of the Contagious Diseases (Animals) Act, 1869, the Privy Council, in exercise of the powers and authorities vested in them by the Act (s. 75), made an order (called the Animals Order of 1871) with reference to animals brought by sea to ports in Great Britain, and to the places used and occupied by such animals on board any vessel in which the same should be so brought to such ports; and thereby, amongst other things, ordered (1) that every such place should be divided into pens by substantial divisions; (2) that each such pen should not exceed nine feet in breadth and fifteen feet in length; that afterwards and whilst the order was in force the plaintiffs delivered on board a vessel called the Hastings, to the defendant as owner of the vessel, certain sheep of the plaintiffs', to be carried by the defendant for reward on board the said vessel from Hamburg to Newcastle, and there delivered to the plaintiffs; and the defendant, as such owner, received and started on the said voyage with the sheep for the purposes and on the terms aforesaid; that all conditions were fulfilled, etc., yet the place in and on board the said vessel which was used and occupied by the sheep during the voyage was not, during the said voyage or any part thereof,

[1] Arguments omitted. — ED.

divided into pens by substantial or other divisions, by reason whereof divers of the sheep were washed and swept away by the sea from off the said ship, and were drowned and wholly lost to the plaintiffs.

Second count, similar to the first, but setting out a third regulation: "that the floor of each such pen should have proper battens or other foot-hold thereon," and alleging the loss of the sheep as aforesaid to have been caused by the want of such battens.

Demurrer and joinder.

[The preamble of the Contagious Diseases (Animals) Act of 1869, 32 & 33 Vict. chapter 70, recited in a note to the report, is as follows:

"Whereas it is expedient to confer on Her Majesty's most honourable Privy Council powers to take such measures as may appear from time to time necessary to prevent the introduction into Great Britain of contagious or infectious diseases among cattle, sheep, and other animals, by prohibiting or regulating the importation of foreign animals; and it is further expedient to provide against the spreading of such diseases in Great Britain, and to consolidate and make perpetual the Acts relating thereto, and to make such other provisions as are contained in this Act."

Sect. 75 of said Act: "The Privy Council may from time to time make such orders as they think expedient for all or any of the following purposes: —

"For insuring for animals brought by sea to ports in Great Britain a proper supply of food and water during the passage and on landing;

"For protecting such animals from unnecessary suffering during the passage and on landing;

(Then follow certain inland purposes.)

"And generally any orders whatsoever which they think it expedient to make for the better execution of this Act, or for the purpose of in any manner preventing the introduction or spreading of contagious or infectious disease among animals in Great Britain."]

Shield, in support of the demurrer.

Herschell, *Q. C.* (*J. W. Mellor* with him), *contra*.

KELLY, C. B. This is an action to recover damages for the loss of a number of sheep which the defendant, a shipowner, had contracted to carry, and which were washed overboard and lost by reason (as we must take it to be truly alleged) of the neglect to comply with a certain order made by the Privy Council, in pursuance of the Contagious Diseases (Animals) Act, 1869. The Act was passed merely for sanitary purposes, in order to prevent animals in a state of infectious disease from communicating it to other animals with which they might come in contact. Under the authority of that Act, certain orders were made; amongst others, an order by which any ship bringing sheep or cattle from any foreign port to ports in Great Britain is to have the place occupied by such animals divided into pens of certain dimensions, and the floor of such pens furnished with battens or foot-holds. The object of this order is to prevent animals from being overcrowded,

and so brought into a condition in which the disease guarded against would be likely to be developed. This regulation has been neglected, and the question is, whether the loss, which we must assume to have been caused by that neglect, entitles the plaintiffs to maintain an action.

The argument of the defendant is, that the Act has imposed penalties to secure the observance of its provisions, and that, according to the general rule, the remedy prescribed by the statute must be pursued; that although, when penalties are imposed for the violation of a statutory duty, a person aggrieved by its violation may sometimes maintain an action for the damage so caused, that must be in cases where the object of the statute is to confer a benefit on individuals, and to protect them against the evil consequences which the statute was designed to prevent, and which have in fact ensued; but that if the object is not to protect individuals against the consequences which have in fact ensued, it is otherwise; that if, therefore, by reason of the precautions in question not having been taken, the plaintiffs had sustained that damage against which it was intended to secure them, an action would lie, but that when the damage is of such a nature as was not contemplated at all by the statute, and as to which it was not intended to confer any benefit on the plaintiffs, they cannot maintain an action founded on the neglect. The principle may be well illustrated by the case put in argument of a breach by a railway company of its duty to erect a gate on a level crossing, and to keep the gate closed except when the crossing is being actually and properly used. The object of the precaution is to prevent injury from being sustained through animals or vehicles being upon the line at unseasonable times; and if by reason of such a breach of duty, either in not erecting the gate, or in not keeping it closed, a person attempts to cross with a carriage at an improper time, and injury ensues to a passenger, no doubt an action would lie against the railway company, because the intention of the legislature was that, by the erection of the gates and by their being kept closed individuals should be protected against accidents of this description. And if we could see that it was the object, or among the objects of this Act, that the owners of sheep and cattle coming from a foreign port should be protected by the means described against the danger of their property being washed overboard, or lost by the perils of the sea, the present action would be within the principle.

But, looking at the Act, it is perfectly clear that its provisions were all enacted with a totally different view; there was no purpose, direct or indirect, to protect against such damage; but, as is recited in the preamble, the Act is directed against the possibility of sheep or cattle being exposed to disease on their way to this country. The preamble recites that "it is expedient to confer on Her Majesty's most honourable Privy Council power to take such measures as may appear from time to time necessary to prevent the introduction into Great Britain

of contagious or infectious diseases among cattle, sheep, or other animals, by prohibiting or regulating the importation of foreign animals," and also to provide against the "spreading" of such diseases in Great Britain. Then follow numerous sections directed entirely to this object. Then comes sect. 75 which enacts that "the Privy Council may from time to time make such orders as they think expedient for all or any of the following purposes." What, then, are these purposes? They are "for securing for animals brought by sea to ports in Great Britain a proper supply of food and water during the passage and on landing," "for protecting such animals from unnecessary suffering during the passage and on landing," and so forth; all the purposes enumerated being calculated and directed to the prevention of disease, and none of them having any relation whatever to the danger of loss by the perils of the sea. That being so, if by reason of the default in question the plaintiffs' sheep had been overcrowded, or had been caused unnecessary suffering, and so had arrived in this country in a state of disease, I do not say that they might not have maintained this action. But the damage complained of here is something totally apart from the object of the Act of Parliament, and it is in accordance with all the authorities to say that the action is not maintainable.

PIGOTT, B. For the reasons which have been so exhaustively stated by the Lord Chief Baron, I am of opinion that the declaration shews no cause of action. It is necessary to see what was the object of the legislature in this enactment, and it is set forth clearly in the preamble as being "to prevent the introduction into Great Britain of contagious or infectious diseases among cattle, sheep, or other animals," and the "spread of such diseases in Great Britain." The purposes enumerated in sect. 75 are in harmony with this preamble, and it is in furtherance of that section that the order in question was made. The object, then, of the regulations which have been broken was, not to prevent cattle from being washed overboard, but to protect them against contagious disease. The legislature never contemplated altering the relations between the owners and carriers of cattle, except for the purposes pointed out in the Act; and if the Privy Council had gone out of their way and made provisions to prevent cattle from being washed overboard, their act would have been *ultra vires*. If, indeed, by reason of the neglect complained of, the cattle had contracted a contagious disease, the case would have been different. But as the case stands on this declaration, the answer to the action is this: Admit there has been a breach of duty; admit there has been a consequent injury; still the legislature was not legislating to protect against such an injury, but for an altogether different purpose; its object was not to regulate the duty of the carrier for all purposes, but only for one particular purpose.

[POLLOCK, B., delivered a concurring opinion. AMPHLETT, B., concurred.]

Judgment for the defendant.

HOLMAN *v.* CHICAGO, &c. R. CO.

1876. 62 *Missouri*, 562.[1]

Hough, J. This was an action to recover damages for the killing of a cow, belonging to the plaintiff, by a train on defendant's railroad in a street of the town of Cameron.

The evidence given at the trial is stated in the bill of exceptions in the following language: "The plaintiff, to maintain the issues on his part, introduced evidence tending to show, that the bell was not rung, nor the whistle sounded on the train mentioned in his statement, as it approached and ran over the cow in controversy; that the cow was killed on defendant's railroad on a public traveled street of the town of Cameron, in Shoal township, by a train on said railroad, and that said cow was worth thirty-five dollars. The defendant introduced one Kiley, who testified that he was the conductor on said train, and that the bell was rung and the whistle sounded. This was all the evidence offered."

It will not be necessary to notice the instructions given and refused. There was a verdict and judgment for the plaintiff, and the defendant has brought the case here by appeal.

The statute in relation to railroad corporations, which requires the bell on the locomotive to be rung, or the steam whistle to be sounded, before reaching and while crossing any traveled public road or street, provides a penalty for the neglect of such requirement, and further declares that the corporation shall be liable for all damages which shall be sustained by any person by reason of such neglect. Conceding that the servants of the defendant neglected to ring the bell or sound the whistle, the question is whether there is any evidence tending to show that the cow was killed by reason of such neglect.

In the case of *Stoneman* v. *Atl. & Pac. R. R. Co.*, 58 Mo. 503, it was said, on the point in judgment, that "the court had no right to declare as a matter of law, that the jury had nothing to find but the killing of the animal at the crossing of a public highway, and the failure of the company to have the bell rung or the whistle sounded. There may have been no connection, whatever, between the negligent omission and the damage; and the very terms of the statute, under which the suit is brought, clearly indicate that the damage must be the result of the negligence."

The foregoing extract clearly asserts, that there is no necessary connection between the failure to ring the bell or sound the whistle, and the killing; that both may concur in point of time, and the latter not be the result of the former. How, then, must the connection be shown? By evidence, undoubtedly. Who must produce such evidence? The party who asserts that such connection exists. The damage must be

[1] Arguments omitted. — Ed.

shown to be the result of the negligence; that is, the negligence must first be shown, and this fact must be supplemented by testimony tending to show that the negligence occasioned the damage. This testimony should consist of all the facts and circumstances attending the killing, so that the jury could fairly and rationally conclude whether it resulted from the failure to ring the bell or sound the whistle, or from other causes. In the case at bar no such testimony was offered; but two facts were shown to fix the defendant's liability, the failure to give the required signal at the crossing, and the killing. No fact was shown tending to connect the two. If the plaintiff can recover on the evidence embodied in the bill of exceptions, it must be, because it is only necessary for the jury to find the killing of the animal on the highway, and the failure to ring the bell or sound the whistle, for there is no testimony from which they can find more. But this, we have seen, is not sufficient. Upon the case made, it was the duty of the court to declare as a matter of law that the plaintiff was not entitled to recover.

This conclusion has been reached after a careful consideration of the case of *Owens* v. *Hann. & St. Jo. R. R.*, 58 Mo. 386; and *Howenstein* v. *Pac. R. R.*, 55 Mo. 33.

The judgment must be reversed and the cause remanded. All the judges concur, except Judge Vories, who is absent.

CHAPTER III.

WHETHER PLAINTIFF'S ACTION IS BARRED BY HIS OWN BREACH OF STATUTORY DUTY.

WELCH *v.* WESSON.

1856. 6 *Gray*, 505.

Action of tort for running down the plaintiff while driving on the highway, and breaking his sleigh. Trial in the Court of Common Pleas, before Mellen, C. J., who signed a bill of exceptions, the substance of which is stated in the opinion.

G. F. Verry, for the plaintiff.

C. E. Pratt, for the defendant.

Merrick, J. It appears from the bill of exceptions to have been fully proved upon the trial that the defendant wilfully ran down the plaintiff and broke his sleigh, as is alleged in the declaration. No justification or legal excuse of this act was asserted or attempted to be shown by the defendant; but he was permitted, against the plaintiff's objection, to introduce evidence tending to prove that it was done while the parties were trotting horses in competition with each other for a purse of money, the ownership of which was to be determined by the issue of the race. And it was ruled by the presiding judge, that if this fact was established, no action could be maintained by the plaintiff to recover compensation for the damages he had sustained, even though the injury complained of was wilfully inflicted. Under such instructions, the jury returned a verdict for the defendant.

We presume it may be assumed as an undisputed principle of law, that no action will lie to recover a demand, or a supposed claim for damages, if, to establish it, the plaintiff requires aid from an illegal transaction, or is under the necessity of showing, and depending in any degree upon an illegal agreement, to which he himself had been a party. *Gregg* v. *Wyman*, 4 Cush. 322; *Woodman* v. *Hubbard*, 5 Foster, 67; *Phalen* v. *Clark*, 19 Conn. 421; *Simpson* v. *Bloss*, 7 Taunt. 246. But this principle will not sustain the ruling of the Court, which went far beyond it, and laid down a much broader and more comprehensive doctrine. Taken without qualification, and just as they were given to the jury, the instructions import that, if two persons are engaged in the same unlawful enterprise, each of them

[1] See also chapter on "Contributory Negligence," *post*. — Ed.

during the continuance of such engagement, is irresponsible for wilful injuries done to the property of the other. No such proposition as this can be true. He who violates the law must suffer its penalties; but yet in all other respects he is under its protection, and entitled to the benefit of its remedies.

But in this case the plaintiff had no occasion to show, in order to maintain his action, that he was engaged, at the time his property was injured, in any unlawful pursuit, or that he had previously made any illegal contract. It is true that, when he suffered the injury, he was acting in violation of the law; for all horse trotting upon wagers for money is expressly declared by statute to be a misdemeanor punishable by fine and imprisonment. *St.* 1846, *c.* 200. But neither the contract nor the race had, as far as appears from the facts reported in the bill of exceptions, or from the intimations of the Court in its ruling, anything to do with the trespass committed upon the property of the plaintiff. That he had no occasion to show into what stipulations the parties had entered, or what were the rules or regulations by which they were to be governed in the race, or whether they were in fact engaged in any such business at all, is apparent from the course of the proceedings at the trial. The plaintiff introduced evidence tending to prove the wrongful acts complained of in the writ, and the damage done to his property, and there rested his case. If nothing more had been shown, he would clearly have been entitled to recover. He had not attempted to derive assistance either from an illegal contract or an illegal transaction. It was the defendant, and not the plaintiff, who had occasion to invoke assistance from proof of the illegal agreement and conduct in which both parties had equally participated. From such sources neither of the parties should have been permitted to derive a benefit. The plaintiff sought nothing of this kind, and the mutual misconduct of the parties in one particular cannot exempt the defendant from his obligation to respond for the injurious consequences of his own illegal misbehavior in another.

Exceptions sustained

STEELE *v.* BURKHARDT.

1870. 104 *Massachusetts*, 59.

Tort for injury alleged to have been caused to the plaintiffs' horse by the negligence of the defendant's servant; submitted to the judgment of the Superior Court, and, on appeal, of this Court, upon the following award of an arbitrator as upon a statement of agreed facts: —

"I find that the injury to the plaintiffs' horse, for which they seek to recover damages in this action, was occasioned by the negligence

and want of due care of the defendant's servant, then in the employment of the defendant. At the time of the injury, the plaintiffs' wagon, to which the injured horse was attached, was placed in Clinton Street in the city of Boston, by the plaintiffs' driver, having the care of the wagon for the loading of certain articles, the weight of which in each and every package thereof was less than five hundred pounds; and the wagon was then wholly or in part backed and placed across Clinton Street, and thereby the plaintiffs were guilty of a violation of an ordinance of the city, which provides as follows: 'And for the loading or unloading of any dirt, bricks, stones, sand, gravel, or of any articles, whether of the same description or not, the weight of which in any one package shall be less than five hundred pounds, no truck, cart, wagon, sleigh, sled, or other vehicle shall be wholly or in part backed or placed across any street, square, lane, or alley, or upon flag-stones or crossings of the same, but shall be placed lengthwise, and as near as possible to the abutting stone of the sidewalk or footway; and any owner or driver or other person having the care of any such vehicle, violating either of the provisions of this section, shall be liable to a fine of not less than five dollars, nor more than twenty dollars, for each offence.' It is in evidence that, at the time of the injury, there was sufficient room, with proper care, for the defendants' team to pass through Clinton Street (a greater degree of care being required by reason of the position of the plaintiffs' team as aforesaid, but not greater than the defendant was bound to use, in my judgment), but the defendant's servant, in passing between the plaintiffs' horse and the opposite curb-stone, ran over and upon the hoof of the plaintiffs' horse, with a heavy team, and in so doing was guilty of the negligence which I report; and I further find, that the only fault upon the part of the plaintiffs is the fact of their horse and wagon having been placed against the curb in violation of the city ordinance above mentioned.

"In case the Court shall find, under the foregoing statement of facts, that the violation hereinbefore mentioned of said ordinance, on the part of the plaintiffs' driver, debarred the plaintiffs from maintaining their action for damages, my award would be judgment for the defendant for his costs of court, with the costs of this reference; otherwise, my award would be for the plaintiffs, for the sum of $225 and their costs of court."

H. J. Stevens, for the plaintiffs.

A. Russ, for the defendant.

CHAPMAN, C. J. The act complained of by the plaintiffs is, that while their horse was standing on Clinton Street, the defendant's servant, while driving a heavy team along the street, carelessly drove it upon the hoof of the plaintiffs' horse, and injured him. The award, which the parties have agreed to accept as a statement of facts, finds that the injury was occasioned by negligence and want of due care in the defendant's servant. The terms of this finding imply that there

was no negligence on the part of the plaintiffs, which contributed to the injury. And it is further found that, though the plaintiffs' team was standing there in violation of a city ordinance, yet there was room for the defendant's team to pass by, using due care, and the only fault of the plaintiffs consisted in the violation of the city ordinance. It is not found that this violation contributed to the injury. It is said by Bigelow, C. J., in *Jones* v. *Andover*, 10 Allen, 20, that, "in case of a collision of two vehicles on a highway, evidence that the plaintiff was travelling on the left side of the road, in violation of the statute, when he met the defendant, would be admissible to show negligence." So the evidence that the plaintiffs' team was standing in the street in violation of a city ordinance was admissible to show negligence on their part. It did show negligence in respect to keeping the ordinance, but did not necessarily show negligence that contributed to the injury. And, notwithstanding this evidence, it was competent to the arbitrator to find, as a fact, that, towards the defendant, the plaintiffs were guilty of no negligence, but were careful to leave him ample room to pass. He did so find in substance; and his finding is agreed to as a fact.

A collision on the highway sometimes happens, when both parties are in motion, and both are active in producing it. In such cases, the plaintiff must prove that he was not moving carelessly. But the collision sometimes happens, as in this case, when the plaintiffs' team is standing still. In such a case, he must prove that his position was not so carelessly taken as to contribute to the collision. The fact is here found that it was not so taken, though it was in violation of the ordinance. There was therefore no such negligence on his part as to defeat the action.

Actions founded on negligence are governed by a plain principle. The plaintiffs' declaration alleges that the injury happened in consequence of the negligence of the defendant. This is held to imply that there was no negligence on the part of the plaintiff which contributed to the injury: and to throw upon him the burden of proving the truth of the allegation. It may depend upon care exercised by himself personally, or by his coachman, if he is riding; or by his teamster, in his absence; or by the person in charge of him, if he is an invalid, or an infant of tender years, or in any way so situated as to need the care of another person in respect to the matter. If there was want of care, either on the part of himself or the person acting for him, and the injury is partly attributable directly to that cause, he cannot recover, simply because he cannot prove what he has alleged. Among the numerous cases sustaining this view are, *Parker* v. *Adams*, 12 Met. 415; *Horton* v. *Ipswich*, 12 Cush. 488; *Holly* v. *Boston Gas Light Co.*, 8 Gray, 131; *Wright* v. *Malden & Melrose Railroad Co.*, 4 Allen, 283; *Callahan* v. *Bean*, 9 Allen, 401.

But it is further contended that these plaintiffs are compelled to prove their own violation of law in order to establish their case, and there-

fore the action cannot be maintained. The substance of the ordinance referred to is, that for loading and unloading packages weighing less than five hundred pounds, wagons shall stand lengthwise of streets, and not crosswise, under a prescribed penalty. The plaintiffs were loading packages of less weight, and their wagon was standing crosswise of the street. But proof of the weight of these packages was not necessary. In this respect the case is like that of *Welch* v. *Wesson*, 6 Gray, 505, where the plaintiff was injured while he was trotting his horse illegally. It is unlike the cases of *Gregg* v. *Wyman*, 4 Cush. 322, and *Way* v. *Foster*, 1 Allen, 408, which were decided in favor of the defendant upon the ground that the plaintiff was obliged to lay the foundation of his action in his own violation of law. Even in those cases, the violation of law by the plaintiffs would not have justified an assault and battery or a false imprisonment of the plaintiffs. In this case, if the packages had weighed more than five hundred pounds, the position of the team would have been the same. In *Spofford* v. *Harlow*, 3 Allen, 176, it was held that, though the plaintiff's sleigh was on the wrong side of the street, in violation of law, the defendant was liable, if his servant ran into the plaintiff carelessly and recklessly, the plaintiff's negligence not contributing to the injury. And it is true generally, that while no person can maintain an action to which he must trace his title through his own breach of the law, yet the fact that he is breaking the law does not leave him remediless for injuries wilfully or carelessly done to him, and to which his own conduct has not contributed. *Judgment for the plaintiffs.*

BOSWORTH *v.* INHABITANTS OF SWANSEY.

1845. 10 *Metcalf*, 363.[1]

This was an action on the Rev. Sts. c. 25, § 22, for an injury alleged to have been received by the plaintiff, by reason of a defect in a highway, in the town of Swansey, which said town was by law obliged to repair.

At the trial in the Court of Common Pleas, before Wells, C. J., it appeared that the injury set forth in the plaintiff's declaration was sustained by him, as therein alleged, on the 11th of June, 1843, being the Lord's day, in the forenoon of said day, as he was travelling from Warren (R. I.), where he resided, to Fall River, on business connected with the conduct of a cause then pending in the District Court of the United States in Rhode Island. The defendants admitted that they were by law bound to keep said highway in repair.

The judge instructed the jury, that the plaintiff would not be entitled to recover, unless he satisfied them that his travelling on the Lord's day was from necessity or for purposes of charity; that it being ad-

[1] Arguments omitted. — Ed.

mitted that his business was of a secular character, the burden was upon him to show the necessity of transacting this business on the Lord's day.

The jury found a verdict for the defendants, and the plaintiff alleged exceptions to the judge's instructions.

Coffin, for plaintiff.

Battelle and *E. Williams*, for defendants.

SHAW, C. J. This was an action to recover damages against a town for a defect in their highway, by means of which the plaintiff sustained a loss. It appeared that the accident occurred on the Lord's day.

It has been repeatedly decided that, to maintain this action, it must appear that the accident was occasioned exclusively by the defect of the highway; to establish which, it must appear that the plaintiff himself is free from all just imputation of negligence or fault. *Smith* v *Smith*, 2 Pick. 621; *Howard* v. *North Bridgewater*, 16 Pick. 189. And in these and other cases, it has been held that the burden of proof is on the plaintiff, to prove affirmatively that he was so free from all fault. *Adams* v. *Carlisle*, 21 Pick. 146; *Lane* v. *Crombie*, 12 Pick. 177. The Court are of opinion that this case comes within this principle. The Rev. Sts. c. 50, § 2, provide that "no person shall travel on the Lord's day, except from necessity or charity," and that "every person so offending shall be punished by a fine, not exceeding ten dollars for every offence." The act of the plaintiff, therefore, in doing which the accident occurred, was plainly unlawful, unless he could bring himself within the excepted cases; and this would be a species of fault on his part, which would bring him within the principle of the cases cited. It would show that his own unlawful act concurred in causing the damage complained of. Then if he would bring himself within either of the exceptions, he must prove the fact which the statute makes an exception. In the case last above cited, *Lane* v. *Crombie*, the verdict was set aside, because the judge instructed the jury, that after the negligence of the defendants had been proved, if they relied on want of due care on the part of the plaintiff, the burden was upon them to prove it. This was held to be erroneous, and the burden was decided to be on the plaintiff to prove herself free from all fault. On this ground the verdict was set aside, although the evidence was such that probably the direction in regard to burden of proof had not much influence.

The Court are therefore of opinion that the instruction of the judge was right, that the burden of proof was on the plaintiff to show that his travelling on the Lord's day was from necessity or for purposes of charity.

What constitutes such necessity or purpose of charity, are questions not raised by the bill of exceptions. *Exceptions overruled.*[1]

[1] Section 1, Chapter 37, Mass. Statutes of 1884, is as follows: "The provisions of chapter ninety-eight of the Public Statutes relating to the observance of the Lord's day shall not constitute a defence to an action for a tort or injury suffered by a person on that day."

SUTTON *v.* TOWN OF WAUWATOSA.

1871. 29 *Wisconsin*, 21.[1]

APPEAL from County Court for Milwaukee County.

Action against a town to recover damages for injuries to plaintiff's cattle, caused by the breaking down of a defective bridge which they were crossing.

The plaintiff started from Columbus on a Friday morning with a drove of about fifty cattle, intending to take them to Milwaukee, and sell them. Stopping at Hartland over Saturday night, he resumed his journey on Sunday morning, and at about four o'clock, P. M., reached a public bridge of about seventy-two feet span, over the Menomonee River, in the town of Wauwatosa. The cattle were driven upon the bridge, and when the greater part of them were near the middle of the span the stringers broke, some twelve feet from the abutments at each end, and precipitated the structure, with the cattle upon it, into the river, causing the death of some, severely injuring others, and rendering the remainder for a time unsalable.

The complaint alleges, that the injury was caused by the dangerous, unsafe, and rotten condition of the bridge, and the neglect of the defendant to keep it in proper repair.

The answer denies the negligence charged to the defendant, and alleges that the cattle were driven upon the bridge in so careless and negligent a manner as to cause it to break; and, also, that they were so driven upon the bridge on Sunday.

After hearing the evidence on the part of the plaintiff, the Court granted a nonsuit, on the ground that the plaintiff, being in the act of violating the statute prohibiting the doing of secular business on Sunday, when the injury occurred, could not recover therefor. The plaintiff appealed.

Jenkins and *Elliott*, for appellant.

C. K. Martin, *Palmer*, *Hooker*, and *Pitkin*, for appellee.

DIXON, C. J. It is very clear that the plaintiff, in driving his cattle along the road and over the bridge, to a market, on Sunday, was at the time of the accident in the act of violating the provisions of the statute of this State, which prohibits, under a penalty not exceeding two dollars for each offence, the doing of any manner of labor, business, or work on that day, except only works of necessity or charity, R. S., c. 183, § 5. It was upon this ground the nonsuit was directed by the Court below, and the point thus presented, that the unlawful act of the plaintiff was negligence, or a fault on his part contributing to the injury, and which will preclude a recovery against the town, is not a new one; nor is the

[1] The arguments are omitted; also that part of the opinion which relates to the question of contributory negligence. — ED.

law, as the Court below held it to be, without some adjudications directly in its favor, and those by a judicial tribunal as eminent and much respected for its learning and ability as any in this country. *Bosworth* v. *Swansey*, 10 Met. 363; *Jones* v. *Andover*, 10 Allen, 18. A similar, if not the very same principle has been maintained in other decisions of the same tribunal. *Gregg* v. *Wyman*, 4 Cush. 322; *May* v. *Foster*, 1 Allen, 408. But in others still, as we shall hereafter have occasion to observe, the same learned Court has, as it appears to us, held to a different and contradictory rule in a class of cases which it would seem ought obviously to be governed by the same principle. The two first above cases were in all material respects like the present, and it was held there could be no recovery against the towns. In the first, the opinion, delivered by Chief Justice Shaw, and which is very short, commences with a statement of the proposition, repeatedly decided by that Court, "that to maintain the action it must appear that the accident was occasioned exclusively by the defect of the highway; to establish which, it must appear that the plaintiff himself is free from all just imputation of negligence or fault." The authorities to this proposition are cited, and the statute against the pursuit of secular business and travel on the Lord's day then referred to, and the opinion proceeds: "The act of the plaintiff, therefore, in doing which the accident occurred, was plainly unlawful, unless he could bring himself within the excepted cases; and this would be a species of fault on his part which would bring him within the principle of the cases cited. It would show that his own unlawful act concurred in causing the damage complained of." This is all of the opinion touching the point under consideration.

In the next case there was a little, and but a little, more effort at reasoning upon the point. The illustrations on page 20, of negligence in a railway company in omitting to ring the bell of the engine, or to sound the whistle at the crossing of a highway, and of the traveller on the wrong side of the road with his vehicle at the time of the collision, and the language of the Court alluding to such "conduct of the party as contributing to the accident or injury which forms the groundwork of the action," very clearly indicate the true ground upon which the doctrine of contributory negligence, or want of due care in the plaintiff, rests, but it is not shown how or why the mere violation of a statute by the plaintiff constitutes such ground. Upon this point the Court only say: "It is true that no direct unlawful act of omission or commission by the plaintiff, done at the moment when the accident occurred, and tending immediately to produce it, is offered to be shown in evidence. But it is also true that, if the plaintiff had not been engaged in the doing of an unlawful act, the accident would not have happened, and the negligence of the defendants in omitting to keep the road in proper repair would not have contributed to produce an injury to the plaintiff. It is the disregard of the requirements of the statute by the plaintiff which constitutes the fault or want of due care, which is fatal to the action." It would seem from this language that the violation of the

statute by the plaintiff is regarded only as a species of remote negligence, or want of proper care on his part, contributing to the injury.

The two other cases above cited were actions of tort by the owners, to recover damages from the bailees for injuries to personal property loaned and used on Sunday, — horses loaned and immoderately driven on that day. They were decided against the plaintiffs, and chiefly on the ground of the unlawfulness of the act of loaning or letting on Sunday of the horses, to be driven on that day in violation of the statute, which the plaintiffs themselves were obliged to show, and the doctrine of *par delictum* was applied. It was in substance held in each case that the plaintiff, by the first wrong committed by him, had placed himself *in pari delicto* with the defendant, with respect to the subsequent and distinct wrong committed by the latter, and the actions were dismissed upon the principle that the law will not permit a party to prove his own illegal acts in order to establish his case.

In direct opposition to the above decisions are the numerous cases decided by the Courts of other States, the Supreme Court of the United States, and the Courts of Great Britain, which have been so diligently collected and ably and forcibly presented in the brief of the learned counsel for the present plaintiff. Of the cases thus cited, with some others, we make particular note of the following: *Woodman* v. *Hubbard*, 5 Foster, 67; *Mohney* v. *Cook*, 26 Penn. 342; *Norris* v. *Litchfield*, 35 N. H. 271; *Corey* v. *Bath*, id. 530; *Merritt* v. *Earle*, 29 N. Y. 115; *Bigelow* v. *Reed*, 51 Maine, 325; *Hamilton* v. *Goding*, 55 id. 428; *Baker* v. *The City of Portland*, 58 id. —; *Kerwhacker* v. *Railway Co.*, 3 Ohio St. 172; *Phila., &c. Railway Co.* v. *Phila., &c. Tow Boat Co.*, 23 How. (U. S.) 209; *Bird* v. *Holbrook*, 4 Bing. 628; *Barnes* v. *Ward*, 9 M. G. & S. 420.

It seems quite unnecessary, if indeed it were possible, to add anything to the force or conclusiveness of the reasons assigned in some of these cases in support of the views taken and decisions made by the Courts. The cases may be summed up and the result stated generally to be the affirmance of two very just and plain principles of law as applicable to civil actions of this nature, namely: first, that one party to the action, when called upon to answer for the consequences of his own wrongful act done to the other, cannot allege or reply the separate or distinct wrongful act of the other, done not to himself nor to his injury, and not necessarily connected with, or leading to, or causing or producing the wrongful act complained of; and, secondly, that the fault, want of due care or negligence on the part of the plaintiff, which will preclude a recovery for the injury complained of, as contributing to it, must be some act or conduct of the plaintiff having the relation to that injury of a cause to the effect produced by it. Under the operation of the first principle, the defendant cannot exonerate himself or claim immunity from the consequences of his own tortious act, voluntarily or negligently done to the injury of the plaintiff, on the ground that the plaintiff has been guilty of some other and independent wrong or viola-

tion of law. Wrongs or offences cannot be set off against each other in this way. "But we should work a confusion of relations, and lend a very doubtful assistance to morality," say the Court in *Mohney* v. *Cook*, "if we should allow one offender against the law, to the injury of another, to set off against the plaintiff that he too is a public offender." Himself guilty of a wrong, not dependent on nor caused by that charged against the plaintiff, but arising from his own voluntary act or his neglect, the defendant cannot assume the championship of public rights, nor to prosecute the plaintiff as an offender against the laws of the State, and thus to impose upon him a penalty many times greater than what those laws prescribe. Neither justice nor sound morals require this, and it seems contrary to the dictates of both that such a defence should be allowed to prevail. It would extend the maxim, *ex turpi causa non oritur actio*, beyond the scope of its legitimate application, and violate the maxim, equally binding and wholesome, and more extensive in its operation, that no man shall be permitted to take advantage of his own wrong. To take advantage of his own wrong, and to visit unmerited and over-rigorous punishment upon the plaintiff, constitute the sole motive for such defence on the part of the person making it. In the cases of the horses let to be driven on Sunday, so far as the owners were obliged to resort to an action on the contract which was executory and illegal, of course there could be no recovery; but to an action of tort, founded not on the contract, but on the tort or wrong subsequently committed by the defendant, the illegality of the contract furnished no defence, as is clearly demonstrated in *Woodman* v. *Hubbard*, and the cases there cited. The decisions under the provision of the constitution of this State abolishing imprisonment for debt arising out of or founded on a contract express or implied, and some others in this Court, strongly illustrate the same distinction. *In re Mowry*, 12 Wis. 52, 56, 57; *Cotton* v. *Sharpstein*, 14 Wis. 229, 230; *Schennert* v. *Kœhler*, 23 Wis. 523, 527.

And as to the other principle, that the act or conduct of the plaintiff which can be imputed to him as a fault, want of due care or negligence on his part contributing to the injury, must have some connection with the injury as cause to effect, this also seems almost too clear to require thought or elaboration. To make good the defence on this ground, it must appear that a relation existed between the act or violation of law on the part of the plaintiff, and the injury or accident of which he complains, and that relation must have been such as to have caused or helped to cause the injury or accident, not in a remote or speculative sense, but in the natural and ordinary course of events as one event is known to precede or follow another. It must have been some act, omission, or fault naturally and ordinarily calculated to produce the injury, or from which the injury or accident might naturally and reasonably have been anticipated under the circumstances. It is obvious that a violation of the Sunday law is not of itself an act, omission, or fault of this kind, with reference to a defect in the highway or in a bridge over

which a traveller may be passing, unlawfully though it may be. The fact that the traveller may be violating this law of the State, has no natural or necessary tendency to cause the injury which may happen to him from the defect. All other conditions and circumstances remaining the same, the same accident or injury would have happened on any other day as well. The same natural causes would have produced the same result on any other day, and the time of the accident or injury, as that it was on Sunday, is wholly immaterial so far as the cause of it or the question of contributory negligence is concerned. In this respect it would be wholly immaterial also that the traveller was within the exceptions of the statute, and travelling on an errand of necessity or charity, and so was lawfully upon the highway.

The mere matter of time, when an injury like this takes place, is not in general an element which does or can enter at all into the consideration of the cause of it. Time and place are circumstances necessary in order that any event may happen or transpire, but they are not ordinarily, if they ever are, circumstances of cause in transactions of this nature. There may be concurrence or connection of time and place between two or three or more events, and yet one event not have the remotest influence in causing or producing either of the others. A traveller on the highway, contrary to the provisions of the statute, yet peaceably and quietly pursuing his course, might be assaulted and robbed by a highwayman. It would be difficult in such case to perceive how the highwayman could connect the unlawful act of the traveller with his assault and robbery so as to justify or excuse them, or how it could be said, that the former had any natural or legitimate tendency to cause or produce the latter. It is true, it might be said, if the traveller had not been present at that particular time or place, he would not have been assaulted and robbed, but that too might be said of any other assault or robbery committed upon him; for if his presence at one time and place be a fault or wrong on his part, contributing to the assault and robbery in the nature of cause to effect, it must be equally so at every other time and place, and so always a defence in the mouth of the highwayman. Every highwayman must have his opportunity by the passing of some traveller, and so some one must pass over a rotten and unsafe bridge or defective highway before any accident or injury can happen from that cause. Connection, therefore, merely in point of time, between the unlawful act or fault of the plaintiff, and the wrong or omission of the defendant, the same being in other respects disconnected and independent acts or events, does not suffice to establish contributory negligence or to defeat the plaintiff's action on that ground. As observed in *Mohney* v. *Cook*, such connection, if looked upon as in any sense a cause, whether sacred and mysterious or otherwise, clearly falls under the rule *causa proxima non remota spectatur*.

"The cause of an event," says Appleton, C. J., in *Moulton* v. *Sanford*, 51 Maine, 134, "is the sum total of the contingencies of every description, which, being realized, the event invariably follows. It is

rare, if ever, that the invariable sequence of events subsists between one antecedent and one consequent. Ordinarily that condition is usually termed the cause, whose share in the matter is the most conspicuous and is the most immediately preceding and proximate to the event."

In the present case the weight of the same cattle, upon the same bridge, either the day before or the day after the event complained of, when the plaintiff would have been guilty of no violation of law in driving them, would most unquestionably have produced the same injurious result. And if, on that day even, the driving had been a work of necessity or charity, as if the city of Milwaukee had been in great part destroyed by fire, as Chicago recently was, and great numbers of her inhabitants in a condition of helplessness and starvation, and the plaintiff hurrying up his drove of beef cattle for their relief, no one doubts the same accident would then have happened, and the same injuries have ensued. The law of gravitation would not then have been suspended, nor would the rotten and defective stringers have refused to give way under the superincumbent weight, precisely as they did do on the present occasion. There are many other violations of law, which the traveller or other person passing along the highway may, at the time he receives an injury from a defect in it, be in the act of committing, and which are quite as closely connected with the injury, or the cause of it, as is the violation of which complaint is made against the present plaintiff. He may be engaged in cruelly beating or torturing his horse, or ox, or other animal; he may be in the pursuit of game, with intent to kill or destroy it, at a season of the year when this is prohibited; he may be exposing game for sale, or have it in his possession, when these are unlawful: he may be in the act of committing an assault, or resisting an officer; he may be fraudulently passing a toll gate, without paying his toll; and he may be unlawfully setting or using a net or seine, for the purpose of catching fish, in an inland lake or stream.

All of these are acts prohibited by the same chapter or statute in which we find the prohibition from work and labor on Sunday, and some of them under the same, but most under a greater penalty than is prescribed for that offence, thus showing the character or degree of culpability which was variously attached to them in the opinion of the legislature. And there are many other minor offences, *mala prohibita* merely, created by statute, which might be in like manner committed. There are in Massachusetts, and doubtless in many of the States, statutes against blasphemy and profane cursing and swearing, the prevention of which seems to be equally if not more an object of solicitude and care on the part of the legislature, than the prevention of labor, travel, or other secular pursuits on Sunday, because more severely punished. It has not yet transpired, we believe, even in Massachusetts, that the action of any person to recover damages for an injury sustained by reason of defects in a highway, has been peremptorily dismissed be-

cause he was engaged at the time in profane cursing or swearing, or because he was in a state of voluntary intoxication, likewise prohibited under penalty by statute.

It is obvious that the breaking down of a bridge from the rottenness of the timbers, or their inability to sustain the weight of the person or of his horses and carriage, could not be affected by either of these circumstances, and yet, on the principle of the decisions above referred to in that State, it is not easy to see why the action must not be dismissed. On principle there could be no discrimination between the cases, and it could make no difference in what the unlawful act of the plaintiff consisted at the time of receiving the injury. We must reject the doctrine of those cases entirely and adopt that of the other cases cited, and which is well expressed by the Supreme Court of Maine, in *Baker* v. *Portland*, 58 Maine, 199, 204, as follows: "The defendant's counsel contends that the simple fact that the plaintiff is in the act of violating the law, at the time of the injury, is a bar to the right of recovery. Undoubtedly there are many cases where the contemporaneous violation of the law by the plaintiff is so connected with his claim for damages as to preclude his recovery: but to lay down such a rule as the counsel claims, and disregard the distinction in the ruling of which he complains, would be productive oftentimes of palpable injustice. The fact that a party plaintiff in an action of this description was at the time of the injury passing another wayfarer on the wrong side of the street, or without giving him half the road, or that he was travelling on runners without bells, in contravention of the statute, or that he was smoking a cigar in the street, in violation of municipal ordinance, while it might subject the offender to a penalty, will not excuse the town for a neglect to make its ways safe and convenient for travellers, if the commission of the plaintiff's offence did not in any degree contribute to produce the injury of which he complains."

Strong analogy is afforded and much weight and force of reason bearing upon this question are found in some of the cases which have arisen upon life policies, and as to the meaning and effect to be given to the condition usually contained in them, exempting the company from liability in case the assured "shall die in the known violation of any law," &c., and it has been held that the violation must be such as is calculated to endanger life, by leading to acts of violence against, or to the bodily or personal injury or exposure of, the assured, and so to operate in producing his death in the connection of cause to effect. See opinions in *Bradley* v. *Mutual Benefit Life Ins. Co.*, 45 N. Y. 422.

In the case of *Clemens* v. *Clemens*, recently decided by this Court, it became necessary to consider the same question, though under different circumstances, as to what violation of law on the part of the plaintiff would bar his action in a Court of justice and leave him remediless in the hands of an overreaching and dishonest antagonist, and the views there expressed are not without their relevancy and adaptation

to the question as here presented. In that case, this Court adopted the rule of law as settled in Massachusetts, favoring the remedy of the plaintiff, against the opposite rule sustained by the adjudications in some of the other States, and consistency of decision seems now clearly to require that our action should be reserved with respect to the rule established by the cases here referred to. The inconsistency upon general principle between these decisions of the same learned Court and those there relied upon and adopted, will, we think, be readily perceived and conceded when carefully examined and considered in connection with each other.

. . . . . .

Judgment reversed, and a venire de novo awarded.[1]

NEWCOMB *v.* BOSTON PROTECTIVE DEPARTMENT.

1888. 146 *Massachusetts*, 596.

Tort for personal injuries occasioned to the plaintiff, a cab-driver, by a collision between the cab and a wagon of the defendant.

At the trial in the Superior Court, before Blodgett, J., evidence was introduced tending to show that the defendant was incorporated under the St. of 1874, c. 61,[2] for the protection of life and property at fires

[1] In *Johnson* v. *Town of Irasburgh*, 47 Vermont, 28 (A. D. 1874), the Supreme Court of Vermont, while agreeing with the reasoning in *Sutton* v. *Wauwatosa*, on the question of causation, nevertheless reached the same result as in *Bosworth* v. *Swansey*, holding that the plaintiff was not entitled to recover. This conclusion was arrived at upon grounds which were not discussed in the above Wisconsin and Massachusetts cases. The very able opinion of Ross, J., upon this point (47 Vermont, 35–38), may be summarized as follows: —

The liability of the town for the insufficiency of the highway is purely statutory. The duty to travellers imposed by the statute is only a duty to that class of travellers who have the right to pass, to those who are legally travelling. The legislature did not intend to impose a duty upon towns "in behalf of a person who was forbidden to use all highways for the purposes of travel, and at a time when he was so forbidden to use them. Can he be a traveller within the purview of the statute who is forbidden to travel?" The duty and liability "are co-extensive with the purposes for which persons can legitimately use the highways, and no greater." "The plaintiff when injured was forbidden by law to use the highway, and by reason thereof the defendant town owed him no duty to provide any kind of a highway, and therefore was under no liability for any insufficiency in any highway."

[2] Section 3 of this statute is as follows: —

"The officers and men of the Boston Protective Department, with their teams and apparatus, shall have the right of way, while going to a fire, through any street, lane, or alley in the city of Boston, subject to such rules and regulations as the city council and the fire commissioners may prescribe, and subject also to the rights of the Boston Fire Department; and any violation of the street rights of the Boston Protective Department shall be punished in the same manner as is provided for the punishment of violations of the rights of the Boston Fire Department in chapter three hundred and seventy-four of the acts of eighteen hundred and seventy-three."

in the city of Boston, and that the collision occurred while one of its wagons, with its regular complement of men, was responding to a fire alarm; that the wagon was proceeding along Washington Street in a northerly direction; that the cab, upon which the plaintiff was sitting, was one of several cabs standing in a line upon the easterly side of Washington Street between the easterly track of a street railway and the curbstone; that the plaintiff's cab and horse were not drawn up lengthwise of the street and as near as possible to the curbstone, but that the horse was facing the sidewalk at an angle so that the body of the cab projected eighteen or twenty inches into the street beyond the line of the other cabs; and that the wagon of the defendant was driven negligently into the cab, causing the accident.

The defendant asked the judge to instruct the jury as follows: —

"1. If the plaintiff, at the time of the accident, was violating the ordinance of the city of Boston, to wit, 'Every owner, driver, or other person having the care and ordering of a vehicle shall, when stopping in a street, place his vehicle and the horse or horses connected therewith lengthwise with the street, as near as possible to the sidewalk,' that was an unlawful act, and he cannot recover in this action. 2. If that unlawful act contributed to cause the alleged injury, the plaintiff was not in the exercise of due care, and therefore he cannot maintain this action. 3. Under section 3, chapter 61, of the Acts of 1874, 'The officers and men of the Boston Protective Department, with their teams and apparatus, shall have the right of way, while going to a fire, through any street, lane, or alley in the city of Boston,' said defendant is not liable for an accident caused by the collision of one of its teams, while going to a fire, with a vehicle standing in the streets, in violation of either of the city ordinances. 4. If the plaintiff, at the time of the action, was violating the ordinance of the city of Boston, to wit, 'Every driver of a vehicle shall remain near it while it is unemployed or standing in a street, unless he is necessarily absent in the course of his duty and business, and he shall so keep his horse or horses and vehicle as not to obstruct the streets,' that was an unlawful act, and he cannot recover in this action. 5. If that unlawful act contributed to cause the alleged injury, the plaintiff was not in the exercise of due care, and therefore he cannot maintain this action."

The judge refused to give these instructions, but instructed the jury as to the effect of a violation of the ordinance as to the position of a vehicle and horse while standing in a street, stating that the rule was applicable to both ordinances as follows: —

"Bearing in mind the provision of the regulation as to the position of a vehicle when not in motion, I instruct you as to the law, that if, at the time of the injury to the plaintiff, he allowed his carriage to stand in the street in violation of this ordinance, such violation is evidence of negligence on his part; and, if such negligence directly contributed to the injury, the plaintiff cannot maintain the action. It cannot be said, as matter of law, that the fact that the plaintiff was

violating a city ordinance necessarily shows negligence that contributed to the injury. Whether the position of the plaintiff's horse and carriage, in violation of an ordinance, did or did not contribute to the injury, is a question of fact for the jury; and in determining this question, the jury will take into consideration all the surrounding facts and circumstances. . . . The plaintiff must prove that his position was not so carelessly taken as to contribute to the collision; and the fact that his position was in violation of the ordinance is not conclusive proof of negligence which contributed to the injury. Or, stating the general rule in a somewhat different form, the fact that the plaintiff is engaged in violating the law does not prevent him from recovering damages of the defendant for an injury which the defendant could have avoided by the exercise of ordinary care, unless the unlawful act contributed proximately to produce the injury. . . . If, applying these rules, you are of the opinion that there was no negligence, in other words, no carelessness, on the part of the plaintiff, which directly contributed to the injury, then the plaintiff is entitled to maintain this action, if he proves another proposition; and as to that, the burden is upon him. And that proposition is, that the defendant's servants, in the care and management of this wagon, at the time the plaintiff was injured, were negligent."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

R. M. Morse, Jr., for the defendant.

W. Gaston and *C. L. B. Whitney*, for the plaintiff.

KNOWLTON, J. The plaintiff brought his action to recover for injuries received while sitting upon his cab, from the negligent driving of a wagon against it by a servant of the defendant corporation. There was evidence tending to show that, at the time of the accident, he was violating an ordinance of the city of Boston, by waiting in a street without placing his vehicle and horse lengthwise with the street, as near as possible to the sidewalk, and that this illegal conduct contributed to the injury. There was evidence applicable in like manner to another similar ordinance, which requires every driver of a vehicle standing in a street so to keep his horse or horses and vehicle as not to obstruct the streets.

As to the alleged violation of each of these ordinances, the defendant asked the Court to instruct the jury as follows: "If that unlawful act contributed to cause the alleged injury, the plaintiff was not in the exercise of due care, and therefore he cannot maintain this action." The presiding judge declined to give this instruction, and gave none which we deem to be equivalent to it. He instructed the jury in these words: "If, at the time of the injury to the plaintiff, he allowed his carriage to stand in the street in violation of this ordinance, such violation is evidence of negligence on his part; and, if such negligence directly contributed to the injury, the plaintiff cannot maintain the action. It cannot be said, as matter of law, that the fact that the plain-

tiff was violating a city ordinance necessarily shows negligence that contributed to the injury." In another part of the charge it was indirectly intimated that, if the plaintiff's unlawful act contributed proximately to produce the injury, he could not recover, but it was nowhere expressly stated.

The question before us then is, whether or not the defendant was entitled to this instruction, — in other words, whether, if the plaintiff's unlawful act contributed to cause his injury, it was a bar to his recovery, or merely evidence of negligence which might or might not bar him, according to the view which the jury should take of his conduct as a whole, in its relation to the accident.

It has often been held that a violation of law at the time of an accident, by one connected with it, is evidence of his negligence, but not conclusive. *Hanlon* v. *South Boston Horse Railroad*, 129 Mass. 310; *Hall* v. *Ripley*, 119 Mass. 135; *Damon* v. *Scituate*, 119 Mass. 66. In recent times a large number of penal statutes have been enacted, in which the legislature has seen fit to punish acts which are not *mala in se*, and sometimes when in a given case there is no actual criminal intent. On grounds of public policy, laws have been passed under which a person is bound to know the facts in regard to the subject with which he is dealing, when under possible circumstances ignorance would not be inconsistent with proper care. One who sells milk must know that it is not adulterated. An unlicensed person must know that what he sells is not intoxicating liquor. *Commonwealth* v. *Boynton*, 2 Allen, 160. And if in a possible case he trespasses in innocent ignorance, the law gives him no relief. He can only appeal to the sense of justice and the discretion of the public authorities to save him from the punishment which the law would inflict. It is obvious that in suits for negligence, if the contributing conduct of the plaintiff is to be considered as a whole, it may sometimes be found that he has not been guilty of actual negligence or fault, although he has violated the law. One element of his action may be neglect of a duty prescribed by a statute, when there are other concurring elements which show that his course was entirely justifiable.

As a general rule, in deciding a question in relation to negligence, each element which enters as a factor into one's act to give it character is to be considered in connection with every other, and the result is reached by considering all together. But, for reasons which will presently appear, illegal conduct of a plaintiff directly contributing to the occurrence on which his action is founded, is an exception to this rule. Such illegality may be viewed in either of two aspects: looking at the transaction to which it pertains as a whole, it may be considered as a circumstance bearing upon the question whether there was actual negligence; or looking at it simply in reference to the violated law, the act may be tried solely by the test of that law. In the latter aspect it wears a hostile garb, and an inquiry is at once suggested, whether the plaintiff, as a transgressor of the law, is in a position to obtain relief

at the hand of the law. In the first view, the illegal conduct comes within the general rule just stated; in the second, it does not. This distinction has not always been observed. A plaintiff's violation of law has usually been discussed in connection with the subject of due care.

In *Bosworth* v. *Swansey*, 10 Met. 363, Chief-Justice Shaw, after referring to the rule that a plaintiff must be free from "imputation of negligence or fault," says, in reference to unlawful travelling on the Lord's day, "This would be a species of fault on his part, which would bring him within the principle of the cases cited."

In *Jones* v. *Andover*, 10 Allen, 18, Chief-Justice Bigelow says, "The term 'due care,' as usually understood, in cases where the gist of the action is the negligence of the defendant, implies not only that a party has not been negligent or careless, but that he has been guilty of no violation of law in relation to the subject-matter or transaction which constitutes the cause of action."

In *Steele* v. *Burkhardt*, 104 Mass. 59, an action for negligence in driving against the plaintiffs' horse, which was left standing in a street in violation of an ordinance, Chief-Justice Chapman considers the general subject of the plaintiffs' due care, and then treats particularly the contention of the defendant that the plaintiffs were compelled to prove their violation of law in order to establish their case.

McGrath v. *Merwin*, 112 Mass. 467, was an action founded on the defendant's alleged negligence in starting the machinery of a mill, while the plaintiff was at work in the wheel-pit making repairs on the Lord's day, and Mr. Justice Morton, in delivering the opinion, deals with the case solely upon the principle that Courts will not aid a plaintiff whose action is founded upon his own illegal act, and says, "The decisions in this Commonwealth are numerous and uniform to the effect that the plaintiff, being engaged in a violation of law, cannot recover, if his own illegal act was an essential element of his case as disclosed upon all the evidence." He further states the rule in such cases to be, that, "if the illegal act of the plaintiff contributed to his injury, he cannot recover; but though the plaintiff at the time of the injury was acting in violation of law, if his illegal act did not contribute to the injury, but was independent of it, he is not precluded thereby from recovering."

In *Davis* v. *Guarnieri*, 45 Ohio St. 470, Owen, C. J., states, as the second of three considerations upon which the doctrine of contributory negligence is founded, "the principle which requires every suitor who seeks to enforce his rights or redress his wrongs to go into court with clean hands, and which will not permit him to recover for his own wrong."

No case has been brought to our attention, and upon careful investigation we have found none, in which a plaintiff whose violation of law contributed directly and proximately to cause him an injury has been permitted to recover for it; and the decisions are numerous to the con

trary. *Hall* v. *Ripley*, 119 Mass. 135; *Banks* v. *Highland Street Railway*, 136 Mass. 485; *Tuttle* v. *Lawrence*, 119 Mass. 276, 278; *Lyons* v. *Desotelle*, 124 Mass. 387; *Heland* v. *Lowell*, 3 Allen, 407; *Steele* v. *Burkhardt*, 104 Mass. 59; *Damon* v. *Scituate*, 119 Mass. 66; *Marble* v. *Ross*, 124 Mass. 44; *Smith* v. *Boston & Maine Railroad*, 120 Mass. 490. And it is quite immaterial whether or not a plaintiff's unlawful act contributing to his injury is negligent or wrong when considered in all its relations. He is precluded from recovering on the ground that the Court will not lend its aid to one whose violation of law is the foundation of his claim. *Hall* v. *Corcoran*, 107 Mass. 251.

While this principle is universally recognized, there is great practical difficulty in applying it. The best minds often differ upon the question whether, in a given case, illegal conduct of a plaintiff was a direct and proximate cause contributing with others to his injury, or was a mere condition of it; or, to state the question in another way, appropriate to the reason of the rule, whether or not his own illegal act is an essential element of his case as disclosed upon all the evidence. Upon this point it is not easy to reconcile the cases. It has been unanimously decided that in *Gregg* v. *Wyman*, 4 Cush. 322, there was error in holding a plaintiff's illegal conduct to be an essential element of his case, when in fact it was merely incidental to it. *Hall* v. *Corcoran*, *ubi supra*. But whatever criticisms may have been made upon the decisions or the assumptions in certain cases, that illegal action of a plaintiff contributed to the result, or was to be treated as a concurring cause, or upon language in disregard of the distinction between a cause and a condition, there has been none upon the doctrine that, when a plaintiff's illegal conduct does directly contribute to his injury, it is fatal to his recovery of damages. *Baker* v. *Portland*, 58 Maine, 199; *Norris* v. *Litchfield*, 35 N. H. 271; *Sutton* v. *Wauwatosa*, 29 Wis. 21.

The plaintiff relies with great confidence upon the case of *Hanlon* v. *South Boston Horse Railroad*, 129 Mass. 310, in which the presiding judge at the trial refused to rule, that, "if the defendant was driving at a rate of speed prohibited by the ordinance of the city of Boston, and this speed contributed to the injury, this fact would itself constitute negligence on the part of the defendant, and would entitle the plaintiff to recover if he was in the exercise of due care," and his refusal was held right by this Court. In giving the opinion, after pointing out that driving at a rate of speed forbidden by the ordinance might have occurred without fault of the driver, and might have been justified by circumstances authorizing the jury to find that there was no negligence, Mr. Justice Colt said, "It is not true that, if an unlawful rate of speed contributed to the injury, that alone would give the plaintiff a right to recover, if he was without fault." There are intimations, without adjudication, to the same effect, in *Wright* v. *Malden & Melrose Railroad*, 4 Allen, 283, and in *Lane* v. *Atlantic Works*, 111 Mass. 136. See also *Kirby* v. *Boylston Market Association*, 14 Gray, 249;

Heeney v. *Sprague*, 11 R. I. 456; *Brown* v. *Buffalo & State Line Railroad*, 22 N. Y. 191; *Flynn* v. *Canton Co.*, 40 Md. 312.

But there is nothing in the language used in *Hanlon* v. *South Boston Horse Railroad* inconsistent with the principle which we have already stated. That decision related to the liability of a defendant. It may be, where a penal statute does not purport to create a civil liability, or to protect the rights of particular persons, that a violation of it will not subject the violator to an action for damages, unless his act, when viewed in connection with all the attendant circumstances, appears to be negligent or wrongful. And at the same time Courts may well hold that, in the sanctuary of the law, a violator of law imploring relief from the consequences of his own transgression will receive no favor.

The instruction requested in the case at bar would have become applicable only upon a finding by the jury that the plaintiff's unlawful act contributed to cause the injury. The jury may have so found; and we are of opinion that upon such a finding, irrespective of the question whether viewed in all its aspects his act was negligent or not, the Court could not properly permit him to recover. The instruction, therefore, should have been given.

The Court rightly refused the instruction requested, that the plaintiff could not recover if at the time of the accident he was violating the ordinance, and so doing an unlawful act. This request ignored the distinction between illegality which is a cause, and illegality which is a condition of a transaction relied on by a plaintiff, or between that which is an essential element of his case when all the facts appear, and that which is no part of it, but only an attendant circumstance. The position of a vehicle, which has been struck by another, may or may not have been one of the causes of the striking. Of course it could not have been struck if it had not been in the place where the blow came. But this is a statement of an essential condition, and not of a cause of the impact. The distinction is between that which directly and proximately produces, or helps to produce, a result as an efficient cause, and that which is a necessary condition or attendant circumstance of it. If the position of the plaintiff's vehicle was such as, in connection with ordinary and usual concurring causes, would naturally produce such an accident, that indicates that it contributed to it. But even in that case, external causes may have been so exclusive in their operation, and so free from any relation to the position of the vehicle, as to have left that a mere condition, without agency in producing the result. What is a contributing cause of an accident is usually a question for a jury, to be determined by the facts of the particular case; and such it has been held to be in many cases like the one before us. *Damon* v. *Scituate*, 119 Mass. 66; *Hall* v. *Ripley*, 119 Mass. 135; *Welch* v. *Wesson*, 6 Gray, 505; *Spofford* v. *Harlow*, 3 Allen, 176; *White* v. *Lang*, 128 Mass. 598; *Baker* v. *Portland*, 58 Maine, 199; *Norris* v. *Litchfield*, 35 N. H. 271; *Sutton* v. *Wauwatosa*, 29 Wis. 21.

The defendant's third request for an instruction was rightly refused, for reasons which have already been stated. The statute referred to does not relieve the defendant from liability for negligence to a plaintiff whose unlawful act or want of due care does not contribute to his injury. In the opinion of a majority of the Court the entry must be —

Exceptions sustained

CHAPTER IV.

NEGLIGENCE — GENERAL REQUISITES OF ACTION FOR NEGLIGENCE.

SECTION I.

Meaning of the Word "Negligence." Distinction between Nonfeasance and Misfeasance.

BLYTH *v.* BIRMINGHAM WATERWORKS CO.

1856. 11 *Exchequer*, 781.

This was an appeal by the defendants against the decision of the judge of the County Court of Birmingham. The case was tried before a jury, and a verdict found for the plaintiff for the amount claimed by the particulars. The particulars of the claim alleged, that the plaintiff sought to recover for damage sustained by the plaintiff by reason of the negligence of the defendants in not keeping their water-pipes and the apparatus connected therewith in proper order.

The case stated that the defendants were incorporated by stat. 7 Geo. IV., c. cix., for the purpose of supplying Birmingham with water.

By the 84th section of their Act it was enacted, that the company should, upon the laying down of any main-pipe or other pipe in any street, fix, at the time of laying down such pipe, a proper and sufficient fire-plug in each such street, and should deliver the key or keys of such fire-plug to the persons having the care of the engine-house in or near to the said street, and cause another key to be hung up in the watch-house in or near to the said street. By sec. 87, pipes were to be eighteen inches beneath the surface of the soil. By the 89th section, the mains were at all times to be kept charged with water. The defendants derived no profit from the maintenance of the plugs distinct from the general profits of the whole business, but such maintenance was one of the conditions under which they were permitted to exercise the privileges given by the Act. The main-pipe opposite the house of the plaintiff was more than eighteen inches below the surface. The fire-plug was constructed according to the best known system, and the materials of it were at the time of the accident sound and in good order. The apparatus connected with the fire-plug was as follows: —

The lower part of a wooden plug was inserted in a neck, which projected above and formed part of the main. About the neck there was a bed of brickwork puddled in with clay. The plug was also enclosed in a cast iron tube, which was placed upon and fixed to the brickwork. The tube was closed at the top by a movable iron stopper having a

hole in it for the insertion of the key, by which the plug was loosened when occasion required it.

The plug did not fit tight to the tube, but room was left for it to move freely. This space was necessarily left for the purpose of easily and quickly removing the wooden plug to allow the water to flow. On the removal of the wooden plug the pressure upon the main forced the water up through the neck and cap to the surface of the street.

On the 24th of February, a large quantity of water, escaping from the neck of the main, forced its way through the ground into the plaintiff's house. The apparatus had been laid down twenty-five years, and had worked well during that time. The defendants' engineer stated, that the water might have forced its way through the brickwork round the neck of the main, and that the accident might have been caused by the frost, inasmuch as the expansion of the water would force up the plug out of the neck, and the stopper being incrusted with ice would not suffer the plug to ascend. One of the severest frosts on record set in on the 15th of January, 1855, and continued until after the accident in question. An incrustation of ice and snow had gathered about the stopper, and in the street all round, and also for some inches between the stopper and the plug. The ice had been observed on the surface of the ground for a considerable time before the accident. A short time after the accident, the company's turncock removed the ice from the stopper, took out the plug, and replaced it.

The judge left it to the jury to consider whether the company had used proper care to prevent the accident. He thought, that, if the defendants had taken out the ice adhering to the plug, the accident would not have happened, and left it to the jury to say whether they ought to have removed the ice. The jury found a verdict for the plaintiff for the sum claimed.

Field, for the appellant. There was no negligence on the part of the defendants. The plug was pushed out by the frost, which was one of the severest ever known.

The Court then called on

Kennedy, for the respondent. The company omitted to take sufficient precautions. The fire-plug is placed in the neck of the main. In ordinary cases the plug rises and lets the water out; but here there was an incrustation round the stopper, which prevented the escape of the water. This might have been easily removed. It will be found, from the result of the cases, that the company were bound to take every possible precaution. The fact of premises being fired by sparks from an engine on a railway is evidence of negligence: *Piggott* v. *Eastern Counties Railway Company*, 3 C. B. 229 (E. C. L. R. vol. 54); *Aldridge* v. *Great Western Railway Company*, 3 M. & Gr. 515 (Id. 42), 4 Scott, N. R. 156, 1 Dowl. N. S. 247, S. C. [MARTIN, B. I held, in a case tried at Liverpool, in 1853, that, if locomotives are sent through the country emitting sparks, the persons doing so incur all the

responsibilities of insurers; that they were liable for all the consequences.[1] I invited counsel to tender a bill of exceptions to that ruling. Water is a different matter.] It is the defendants' water, therefore they are bound to see that no injury is done to any one by it. An action has been held to lie for so negligently constructing a hayrick at the extremity of the owner's land, that, by reason of its spontaneous ignition, his neighbor's house was burnt down: *Vaughan* v. *Menlove*, 3 Bing. N. C. 468 (E. C. L. R. vol. 32). [BRAMWELL, B. In that case discussions had arisen as to the probability of fire, and the defendant was repeatedly warned of the danger, and said he would chance it.] He referred to *Wells* v. *Ody*, 1 M. & W. 452. [ALDERSON, B. Is it an accident which any man could have foreseen?] A scientific man could have foreseen it. If no eye could have seen what was going on, the case might have been different; but the company's servants could have seen, and actually did see, the ice which had collected about the plug. It is of the last importance, that these plugs, which are fire-plugs, should be kept by the company in working order. The accident cannot be considered as having been caused by the act of God: *Siordet* v. *Hall*, 4 Bing. 607 (Id. 13).

ALDERSON, B. I am of opinion that there was no evidence to be left to the jury. The case turns upon the question, whether the facts proved show that the defendants were guilty of negligence. Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done. A reasonable man would act with reference to the average circumstances of the temperature in ordinary years. The defendants had provided against such frosts as experience would have led men, acting prudently, to provide against; and they are not guilty of negligence, because their precautions proved insufficient against the effects of the extreme severity of the frost of 1855, which penetrated to a greater depth than any which ordinarily occurs south of the polar regions. Such a state of circumstances constitutes a contingency against which no reasonable man can provide. The result was an accident, for which the defendants cannot be held liable.

MARTIN, B. I think that the direction was not correct, and that there was no evidence for the jury. The defendants are not responsible, unless there was negligence on their part. To hold otherwise would be to make the company responsible as insurers.

BRAMWELL, B. The Act of Parliament directed the defendants to lay down pipes, with plugs in them, as safety-valves, to prevent the

[1] See *Lambert* v. *Bessey*, T. Raym. 422; *Scott* v. *Shepherd*, 3 Wils. 403. Probably an action of trespass might have been brought.

bursting of the pipes. The plugs were properly made, and of proper material; but there was an accumulation of ice about this plug, which prevented it from acting properly. The defendants were not bound to keep the plugs clear. It appears to me that the plaintiff was under quite as much obligation to remove the ice and snow which had accumulated, as the defendants. However that may be, it appears to me that it would be monstrous to hold the defendants responsible because they did not foresee and prevent an accident, the cause of which was so obscure, that it was not discovered until many months after the accident had happened.

Verdict to be entered for the defendants.

SOUTHERN R. R. CO. *v.* GRIZZLE.

O'NEAL *v.* GRIZZLE.

1906. 124 *Georgia*, 735.[1]

Action by Mrs. Grizzle against the Southern Railway Company and T. A. O'Neal.

The petition alleged, in substance, that the petitioner's husband was killed by the negligence of the railway company, and of O'Neal, who was the engineer in charge of the train, while the train was being operated over a public-road crossing. It was alleged, *inter alia*, that no bell was rung nor whistle sounded, nor the speed of the train checked, and that the requirements of the blow-post law[2] were entirely disregarded by the engineer. To this petition O'Neal demurred on several grounds. The demurrer was overruled, and O'Neal excepted.

John J. Strickland and *S. J. Winn*, for plaintiff in error.

Atkinson & Born, contra.

Cobb, P. J. 1. An agent is not ordinarily liable to third persons for mere nonfeasance. *Kimbrough* v. *Boswell*, 119 Ga. 201. An agent is, however, liable to third persons for misfeasance. Nonfeasance is the total omission or failure of the agent to enter upon the performance of some distinct duty or undertaking which he has agreed with

[1] Only so much of the case is given as relates to a single point. Statement abridged. Part of opinion omitted. — Ed.

[2] Sect. 2222. "There must be fixed on the line of said roads, and at the distance of four hundred yards from the centre of each of such road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road."

Sect. 2224. "If any engineer neglects to blow said whistle as required, and to check the speed as required, he is guilty of a misdemeanor. . . ." — Georgia Code of 1895. — Ed.

his principal to do. Misfeasance means the improper doing of an act which the agent might lawfully do; or, in other words, it is the performing of his duty to his principal in such a manner as to infringe upon the rights and privileges of third persons. Where an agent fails to use reasonable care or diligence in the performance of his duty, he will be personally responsible to a third person who is injured by such misfeasance. The agent's liability in such cases is not based upon the ground of his agency, but upon the ground that he is a wrong-doer, and as such he is responsible for any injury he may cause. When once he enters upon the performance of his contract with his principal, and in doing so omits, or fails to take reasonable care in the commission of, some act which he should do in its performance, whereby some third person is injured, he is responsible therefor to the same extent as if he had committed the wrong in his own behalf. See 2 Clark & Skyles on Agency, 1297 *et seq.* Misfeasance may involve also to some extent the idea of not doing; as where an agent engaged in the performance of his undertaking does not do something which it is his duty to do under the circumstances, or does not take that precaution or does not exercise that care which a due regard to the rights of others requires. All this is not doing, but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation. Mechem on Ag. § 572. As was said by Gray, C. J., in *Osborne* v. *Morgan*, 130 Mass. 102 (39 Am. Rep. 439): "If the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance or doing nothing, but it is misfeasance, doing improperly." In that case the agent was held liable by the fall of a tackle-block and chains from an iron rail suspended from the ceiling of a room, which fell for the reason that the agent had suffered them to remain in such a manner and so unprotected that they fell upon and injured the plaintiff. In *Bell* v. *Josselyn*, 3 Gray, 309 (63 Am. Dec. 742), Metcalf, J., said: "Assuming that he was a mere agent, yet the injury for which this action was brought was not caused by his nonfeasance, but by his misfeasance. Nonfeasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do. . . . The defendant's omission to examine the state of the pipes, . . . before causing the water to be let on, was a nonfeasance. But if he had not

caused the water to be let on, that nonfeasance would not have injured the plaintiff."

In the present case the failure of the engineer to comply with the requirements of the blow-post law was not doing, but the running of the train over the crossing at a high rate of speed without giving the signals required by law was a positive act, and the violation of a duty which both the engineer and the railroad company owed to travelers upon the highway. The engineer having once undertaken in behalf of the principal to run the train, it was incumbent upon him to run it in the manner prescribed by law; and a failure to comply with the law, although it involved an act of omission, was not an act of mere nonfeasance, but was an act of misfeasance. This view is strengthened by the fact that the blow-post law renders the engineer indictable for failure to comply with its provisions. The allegations of the petition were therefore sufficient to charge O'Neal with a positive tort, for which the plaintiff would be entitled to bring her action against him.

SECTION II.

Distinction between Negligent Tort and Intentional Tort.[1]

O'BRIEN *v.* LOOMIS.

1890. 43 *Missouri Appeals*, 29.[2]

APPEAL from the St. Louis City Circuit Court.

Joint action against father and son, the latter about ten years of age, to recover damage to plaintiff arising from a gunshot wound inflicted by the son, Henry Loomis. A demurrer by the father was sustained, and the case proceeded against the son alone.

The petition stated that Henry Loomis was a reckless child, and had little or no discretion in the use of firearms; and that Henry "did, through his said reckless habit and want of discretion in the use of said gun, fire said gun at the plaintiff," the bullet striking the plaintiff.

The answer of the son was a general denial and a plea of contributory negligence.

Upon the trial, the following instructions (*inter alia*) were given: —

"If the jury find from the evidence in this case that the act of the boy in shooting plaintiff was either intentional or was done without

[1] See also Section vi, *post*, and Section iii of Chapter vii, *post*. — ED.

[2] Statement abridged from opinion. — ED.

the exercise of ordinary care on the part of defendant, and was a negligent act, considering his age and discretion, then plaintiff is entitled to recover."

". . . If the jury further find from the evidence that the said Henry Loomis intentionally fired said gun at the plaintiff, intending to wound or injure the plaintiff," then the plaintiff is entitled to recover fair compensation and the jury may further award punitive damages.

"If the jury believe from the evidence that plaintiff by her own negligence directly contributed in any degree to the injury sued for, they will find for defendant, unless the jury find from the evidence that the act of defendant causing the injury was wilfully and intentionally done by him."

Verdict for plaintiff, $2500. Judgment for plaintiff. Defendant appealed.

Dickson & Smith, for appellant.

A. R. Taylor, for respondent.

THOMPSON, J. I. We are of opinion that there is a fundamental error running through these instructions, in that they authorize a recovery on the hypothesis of the injury having been "intentional," or that the gun was fired "intentionally" at the plaintiff, the defendant "intending to wound and injure her"; whereas the petition does not allege that the injury was *wilful* or *intentional*, but alleges that it was *negligent*. Recurring to the petition, it will be seen that it is unfortunate in having been drawn to charge both the father and the son, and in being the petition on which the case proceeded after final judgment had been rendered for the father on demurrer. It charges that the defendant, Henry, was "reckless," and that he "had little or no discretion," and it also charges that the injury happened "through his said reckless habit and want of discretion"; and it does not charge that it happened in any other manner. Webster defines the word "reckless," as "rashly or indifferently negligent; careless; heedless; mindless." The petition, therefore, claims damages for an injury the result of *negligence*, and the instruction authorizes the jury to give damages on the hypothesis of *wilfulness*, and an intent to injure. We are of opinion that this case falls within the well-settled rule that the issues made by the pleadings cannot be broadened by the instructions.

It is true that, under our system, as at common law, the plaintiff may bring an action for a *direct injury*, such as shooting and wounding, by a petition in the form of a declaration in the common-law action of *trespass*, charging in the barest terms that the defendant *unlawfully and wrongfully* inflicted the injury upon the plaintiff, and that he can then recover on proof that the injury — provided it be the direct injury alleged — was the result of *negligence merely*. *Conway* v. *Reed*, 66 Mo. 346. The reason was that in the case of a direct injury proceeding from the plaintiff to the defendant, nothing excused

it short of proof that the injury was unavoidable. *Weaver* v. *Ward*, Hobart, 134. That a plaintiff could sue in trespass and recover for a direct injury, either on proof that the injury was *intentional or negligent* has been familiar learning to the profession ever since the celebrated "*Squib Case*," *Scott* v. *Sheppard*, 2 W. Black. 892. See *Morgan* v. *Cox*, 22 Mo. 373; *Castle* v. *Duryee*, 2 Keyes (N. Y.) 169.

But the policy of our code of procedure is to require the party to state in his pleadings his real ground of action or defence; and, if he chooses one ground, he cannot so enlarge it as to recover on another. This is in accordance with what is said on one of the opening pages of a standard work in respect of actions for damages for negligence:

"It is clear that a plaintiff may elect between suing upon a charge of wilful injury, or a mere charge of negligence, wherever the facts are susceptible of a double construction. It does not lie with the defendant to insist that he has been criminal instead of merely careless. In making his election, however, the plaintiff must remember that he will be bound by it. If the complaint sets up a case of wilful injury, it cannot be sustained by evidence of mere negligence, however gross; while, on the other hand, if it charges negligence only, the plaintiff cannot put in evidence, the only relevancy of which consists in proving *intentional* injury, such as would sustain an entirely different action." Shearman and Redfield on Negligence [4 Ed.] sec. 7.

We have been able to find no case, decided in this state, in which a party sued on the theory of negligence and recovered on the theory of wilfulness or malice, nor indeed any case where such a thing was attempted. But this is probably evidence of an understanding on the part of the profession that such a thing cannot be done. We have, however, been referred to several decisions of the supreme court of Indiana, which proceed on the distinction between actions grounded on negligence and actions grounded on wilfulness, which is stated by the above-named authors. *Pennsylvania Co.* v. *Sinclair*, 62 Ind. 301; *Pennsylvania Co.* v. *Smith*, 98 Ind. 42; *Cincinnati, etc., Ry. Co.* v. *Eaton*, 53 Ind. 307; *Terre Haute, etc., Ry. Co.* v. *Graham*, 95 Ind. 286. In *Pennsylvania Co.* v. *Smith*, *supra*, it is held that, under an averment of negligence, there can be no recovery for a wilful injury.

. . . . . .

That the action for negligence is essentially different from the action for a wilful and intentional injury, is suggested by the last of the above instructions, where the learned judge correctly told the jury that contributory negligence was a defence in the former case, but not in the latter.

If, then, the issues made by the pleadings were not large enough to embrace the hypothesis of a wilful or intentional injury, it was error for the court to instruct the jury on such a theory, although the evidence, in a proper state of the pleadings, might have warranted such an instruction; for our procedure is very strict to the effect that it is error to submit to the jury an issue of fact not made by the pleadings.

Melvin v. *Railroad*, 89 Mo. 106; *Kenney* v. *Railroad*, 70 Mo. 252; *Benson* v. *Railroad*, 78 Mo. 504, 513; *Fulkerson* v. *Thornton*, 68 Mo. 468.

[Remainder of opinion omitted.]

Judgment reversed. Cause remanded.

WINSLOW, J., IN McCLELLAN *v.* CHIPPEWA, &c., R. R. CO.

1901. 110 *Wisconsin*, 326, pp. 330, 331.

WINSLOW, J. The claim is now made by appellant that there was evidence in the case sufficient to show a case of wilful intent to injure, or that reckless and wanton disregard on the part of defendant's employees of the plaintiff's rights and safety which is deemed equivalent to an intent to injure, and may be called a constructive intent, and which has been inaccurately termed gross negligence. *Bolin* v. *C., St. P., M. & O. R. Co.*, 108 Wis. 333. With regard to this claim it is sufficient to say that no such cause of action is stated, or attempted to be stated, in the complaint. The complaint simply charges negligence. Certainly, if wilful misconduct is claimed, or a wanton and reckless act equivalent in law to wilful misconduct, the cause of action is a different one from a cause of action founded upon negligence simply. The defendant is entitled to know what the cause of action is upon which the plaintiff relies. 14 Ency. of Pl. & Pr. 338, sec. 8.

INDIANA, &c. R. R. CO. *v.* OVERTON.

1889. 117 *Indiana*, 253.

MITCHELL, J. Overton sued the railroad company to recover damages for the alleged intentional killing of his cow at a highway crossing.

He charged in his complaint "that the defendant, for the purpose and with the intention of running its train of cars over and upon said cow, wilfully, recklessly and carelessly" ran its train at a great and unusual rate of speed over and through the streets of the city of Crawfordsville, in violation of an ordinance of the city, and over and upon the plaintiff's cow, and thereby wantonly and wilfully killed the animal.

While there are some ambiguous averments in the complaint, it nevertheless charges that the servants of the railroad company recklessly committed some acts, and wilfully omitted others, with the purpose and intention of running the train of cars over and upon the plaintiff's cow. It is contended on the plaintiff's behalf here that

the facts averred show that the animal was purposely and intentionally run upon, and that the facts stated make the complaint good upon that theory. We are constrained to adopt this view. *Gregory* v. *Cleveland, etc., R. R. Co.*, 112 Ind. 385, and cases cited.

The demurrer to the complaint was therefore properly overruled. The evidence fails completely, however, to sustain the complaint.

There is an entire absence of evidence tending to show either an actual or constructive intent on the part of any person connected with the management of the train to run upon or over the plaintiff's cow.

The engineer in charge of the engine testified that he did not see the cow upon the track until he was within about one hundred feet of the crossing, and that he had no intention whatever of running upon the animal. There is not a syllable of testimony, nor are there any circumstances, tending to contradict the engineer's evidence.

It does not appear that the train was being run at a dangerous or unusual rate of speed, nor was it shown that the crossing was of such a character as made it the duty of the engineer to be on the lookout for animals, or to take extraordinary precautions. *Dennis* v. *Louisville, etc., R. W. Co.*, 116 Ind. 42.

It is argued that the engineer was negligent in not discovering the cow and stopping his train or frightening the animal off the track, but it must be remembered that the complaint does not count upon a right of action based upon the company's negligence. A case like this must proceed upon one theory or the other. A party cannot frame a single paragraph of complaint in such manner as to be entitled to recover either for an intentional or negligent injury, as the facts may appear. The plaintiff having elected to sue for an injury intentionally and wilfully committed, he must stand by that theory, and cannot, without other pleadings, shift his ground and recover upon the theory that the defendant was negligent.

The judgment is reversed, with costs, with directions to the circuit court to sustain the appellant's motion for a new trial.

PROCTOR *v.* SOUTHERN RAILWAY.

1902. 64 *South Carolina*, 491.

JONES, J. The appeal herein is from an order refusing to grant an amendment to the complaint. The paragraph of the complaint sought to be amended is as follows: "IV. That the plaintiff seeing that the said engine and train of freight cars attached thereto had come to a full stop, then drove his wagon and team back into the said public road and attempted to pass the said engine and train of freight cars attached thereto while standing, but as soon as the plaintiff approached

near and opposite to the said engine, he being in the said public road, the defendant, its agents, servants and employees, who were in charge of said engine and train of freight cars attached thereto, and being in full and plain view of the plaintiff and his wagon and team, with intent to frighten and scare the plaintiff's team and injure the plaintiff, wilfully and wantonly and recklessly, and not regarding the rights of the plaintiff in that regard, let off steam from said engine, so that the said team of mules became frightened and unmanageable and were made to run away, and threw the plaintiff out of said wagon, and the wheels of said wagon were made to pass over the body of the plaintiff, inflicting serious and painful wounds and bruises on the plaintiff's back, foot, and injuring the plaintiff internally so that he became ill and sick, and for a long time was unable to attend to his business, and was confined to his bed and suffered intense pain from the injuries to his left kidney, and he fears that from the effects of said injuries he will never be well and strong again." The amendment proposed was to strike out the words, "with intent to frighten and scare the plaintiff's team and injure the plaintiff, wilfully, wantonly and recklessly, and not regarding the rights of the plaintiff in that regard, let off steam from said engine," and insert in lieu thereof the following words: "wilfully, wantonly, recklessly, negligently and carelessly, and without regard to the rights of the plaintiff, let off steam from said engine in an unusual and unnecessary manner and in large quantities."

On the former appeal in this case, 61 S. C. 170, this Court held the complaint only alleged a wilful tort, and that the plaintiff could not recover for mere negligence. The object of the proposed amendment was to change the complaint so as to permit a recovery not only for a wilful tort, but for negligence. The order refusing the amendment was in these words: "In the above stated action, a motion was made before me at Greenwood, S. C., at the August term, 1901, to amend the complaint in several particulars. The first I allow with hesitation; but the second, the really important one, I cannot allow. At the hearing I thought that the amendment might be allowed under the act of 1896 (22 Stat. 693), and reserved my opinion in order that I might consider the matter more thoroughly. On examination of said act, however, and of recent opinion of the Supreme Court in this same case, I conclude that the amendment asked for cannot be allowed, and it is so ordered."

Appellant contends that the single question presented by this appeal is, "Did the presiding judge err in holding that he had no power to allow the plaintiff to amend his complaint?" We do not so construe the order, for in the same order another amendment was allowed. All that the judge meant by the language used was that the particular amendment proposed was not one which he could properly allow. In this we think he was right. The Code does not authorize the insertion of a new cause of action by way of amendment. The amendment proposed should be material to the case which has been defectively stated,

and must not substantially change the cause of action. See 194 of the Code of Civil Procedure, which has been construed and applied in numerous cases, among which see *Trumbo* v. *Finley*, 18 S. C. 305; *Whaley* v. *Stevens*, 21 S. C. 221; *Kennerty* v. *Etiwan Phosphate Co.*, 21 S. C. 240; *Skinner* v. *Hodge*, 24 S. C. 165; *Sullivan* v. *Sullivan*, 24 S. C. 474; *Clayton* v. *Mitchell*, 31 S. C. 199, 9 S. E. R. 814; *Lilly* v. *R. R. Co.*, 32 S. C. 142, 10 S. E. R. 934; *Mayo* v. *R. R. Co.*, 43 S. C. 225, 21 S. E. R. 110; *Brown* v. *R. R. Co.*, 58 S. C. 468. The opinion on the former appeal in this case shows that an action based upon negligence is wholly distinct from an action based upon a wilful tort. The same evidence will not support both, for the former is for an injury done inadvertently, while the latter is for an injury done wilfully; the same measure of damages does not apply to both, for in an action for negligence, actual damages alone are recoverable, while in an action for a wilful tort, not only actual but punitive damages may be recovered; the same defences are not available in both; for in an action based upon mere negligence, the plea of contributory negligence is available to the defendant, while in an action for a wilful tort, such plea is not available. These are some of the tests in determining whether a new cause of action is alleged in the proposed amendment. 1 Ency. Pl. & Pr. 556. The amendment proposed in this case, subjected to these tests, attempted to allege a new and distinct cause of action, and there was, therefore, no abuse of discretion in refusing to allow the amendment.

We do not thiuk the Act of 1898, 22 Stat. 693, to regulate the practice in the courts of this State in actions *ex delicto* for damages, applies to the particular question before us. That act, by sec. 1, allows actual damages to be recovered in an action *ex delicto*, in which punitive damages are claimed, and provides that no party shall be required to make any separate statement of facts as a basis for the claim of either actual or punitive damages, or to elect whether he will claim actual or punitive damages. In sec. 2 of said act it is provided, "That in all cases where two or more acts of negligence or other wrong are set forth in the complaint as causing or contributing to the injury for which such suit is brought, the party plaintiff in such suit shall not be required to state such several acts separately, nor shall such party be required to elect upon which he will go to trial, but shall be entitled to submit his whole case to the jury under the instructions of the Court and to recover such damages as he sustained, whether such damages arose from one or another or all of such acts or wrongs in the complaint." The effect of this act is to change the rule as stated in *Spellman* v. *R. R.*, 35 S. C. 486, 14 S. E. R. 947, to the effect that when the cause of action is for exemplary or punitive damages, actual damages may not be recovered — *Glover* v. *R. R.*, 57 S. C. 234; and also to change the rule laid down in *Ruff* v. *R. R. Co.*, 42 S. C. 114, 20 S. E. R. 27; that when two or more unconnected acts of negligence are stated as causing the injury, the plaintiff may be required to elect. The statute also per-

mits the jumbling together in one statement of all acts of negligence and other wrongs, which include acts of wilful wrong, but the statute does not expressly or by implication undertake to declare that an action based upon mere negligence is not wholly distinct from an action based upon a wilful tort. If plaintiff had originally alleged as proposed by the amendment, he could not have been required to make a separate statement of the acts or facts, showing negligence on the one hand or wilful wrong on the other, and could not have been required to elect upon which acts or class of acts he would rely; but having elected to bring his action for wilful tort in the first instance, he cannot now be permitted to insert a new cause of action based on mere negligence.

The judgment of the Circuit Court is affirmed.[1]

SECTION III.

Distinction between Negligent Tort and Mere Breach of Contract.

TUTTLE *v.* GILBERT MANUFACTURING CO.

1887. 145 *Massachusetts*, 169.[2]

TORT, by lessee of a building against lessor. The lessee claimed, and introduced evidence to show, that, at the time of letting, the lessor agreed to repair the building and put it in safe condition; that the lessee suffered damage by reason of a defect in the building; and that the lessor failed and neglected to make repairs until after the damage to the plaintiff.

Upon the evidence, the judge ruled that plaintiff could not recover, and ordered a verdict for defendant. Plaintiff excepted.

H. W. King and *C. M. Rice*, for plaintiff.

W. S. B. Hopkins, for defendant.

MORTON, C. J. It is the general rule that there is no warranty im-

[1] Under some broad modern statutes relative to amendments, a different result might be reached. Thus in Alabama a similar amendment is held allowable; *Central of Georgia R. Co.* v. *Foshee*, 125 Ala. 199, 221-225; although a count averring both wilfulness and negligence is held bad for repugnancy; 117 Ala. 367, p. 382; and an averment of wilfulness is held not sustained by proof of negligence; 93 Ala. p. 169, 17 Ala. 436.

In 3 Elliott on Railroads, 2d ed., sec. 1251, the author, after indorsing a view similar to that taken in *Proctor* v. *Southern Railway*, says (in note 28), "Many of the decisions, however, fail to make this distinction, and a recovery for what is called wilful or wanton negligence has frequently been allowed under a complaint for damages on account of alleged negligence." Compare 2 Jaggard on Torts, 823-825; and see cases in the chapter on Contributory Negligence, *post*. — ED.

[2] The statement has been much abridged. — ED.

plied in the letting of premises that they are reasonably fit for use. The lessee takes an estate in the premises hired, and he takes the risk of the quality of the premises, in the absence of an express or implied warranty by the lessor, or of deceit. A lessee, therefore, if he is injured by reason of the unsafe condition of the premises hired, cannot maintain an action against the lessor, in the absence of warranty or of misrepresentation. In cases where lessors have been held liable for such injuries to the lessees, the liability is founded in negligence. *Looney* v. *McLean*, 129 Mass. 33. *Bowe* v. *Hunking*, 135 Mass. 380, and cases cited.

The plaintiff admits the general rule, but contends that this case is taken out of it because, at the time of the letting, the defendant agreed to repair and put in a safe condition the stable floor, the unsafe condition of which caused the injury. The contract relied on is a loose one; it fixed no time within which the repairs were to be made, and it is doubtful whether the evidence proved any breach of contract on the part of the defendant. But if we assume that the contract was to make the repairs within a reasonable time, and that the jury would be justified in finding that the defendant had not performed it within a reasonable time, the question is whether, for such a breach, the plaintiff can maintain an action of tort to recover for personal injuries sustained by reason of the defective condition of the stable floor.

The cases are numerous and confusing as to the dividing line between actions of contract and of tort, and there are many cases where a man may have his election to bring either action. Where the cause of action arises merely from a breach of promise, the action is in contract.

The action of tort has for its foundation the negligence of the defendant, and this means more than a mere breach of a promise. Otherwise, the failure to meet a note, or any other promise to pay money, would sustain an action in tort for negligence, and thus the promisor be made liable for all the consequential damages arising from such failure.

As a general rule, there must be some active negligence or misfeasance to support tort. There must be some breach of duty distinct from breach of contract. In the case at bar, the utmost shown against the defendant is that there was unreasonable delay on its part in performing an executory contract. As we have seen, it is not liable by reason of the relation of lessor and lessee, but its liability, if any, must rest solely upon a breach of this contract.

We do not see how the cases would differ in principle if an action were brought against a third person who had contracted to repair the stable floor and had unreasonably delayed in performing his contract. We are not aware of any authority for maintaining such an action. If the defendant had performed the work contemplated by its contract unskilfully and negligently, it would be liable to an action of tort, because in such case there would be a misfeasance, which is a suffi-

cient foundation for an action of tort. Such was the case of *Gill* v. *Middleton*, 105 Mass. 477.

The case of *Ashley* v. *Root*, 4 Allen, 504, does not conflict with our view, but recognizes the rule that to sustain an action of tort there must be more than a mere breach of contract.

The plaintiff now argues that he had the right to go to the jury upon the questions of warranty and deceit. It does not appear that this claim was made in the Superior Court; but it is clear that there is no sufficient evidence of any warranty that the stable was safe, or of any deceit or misrepresentation on the part of the defendant or its agent.

Exceptions overruled.[1]

KELLY *v.* METROPOLITAN R. R. CO.

1895. *Law Reports* (1895), 1 *Queen's Bench Division*, 944.

APPEAL from an order of a judge at chambers affirming an order of a master directing that the plaintiff's bill of costs should be referred back to be drawn on the county court scale.

The action was brought to recover damages for personal injuries to the plaintiff while a passenger on the defendants' railway. The statement of claim alleged an agreement by the defendants to carry the plaintiff safely, and a breach of that agreement in negligently and improperly managing the train in which he was, so that it ran into the wall at Baker Street Station, whereby the plaintiff sustained injury. It was admitted by the defendants that the accident occurred by the negligence of the engine-driver in not turning off steam in time to prevent the train running into the dead-end at the station. A sum of 20*l.* was paid into court, and the jury returned a verdict for the plaintiff for 25*l.*

[1] "The plaintiff leased premises from defendant, who, knowing a floor to be defective, agreed to repair. *Held*, personal injuries are recoverable in a tort action based on the defendant's negligence. *Graff* v. *Lemp Brewery Co.*, (Mo. 1908) 109 S. W. 1044."

"Damages resulting from failure to perform certain contracts are recoverable in tort, because they arise from a violation of the legal duties incident to the relationship (common carrier, innkeeper, etc.) established by the contract. Burdick, Law of Torts, 5-16. The relationship of landlord and tenant, however, does not impose upon the landlord any duty to repair, McAdam L. & T. 1238, except in regard to those portions of the building which are under his control. *Dollard* v. *Roberts*, (1891) 130 N. Y. 269. With this exception, therefore, a breach of an agreement to repair is not a violation of a tenant's legal right so as to support an action in tort, *Tuttle* v. *Gilbert Mfg. Co.*, (1887) 145 Mass. 169, and personal injuries resulting from an agreement to repair are not recoverable, *Davis* v. *Smith*, (1904) 26 R. I. 129, in the absence of some active negligence or misfeasance distinct from the mere breach of promise. *Tuttle* v. *Gilbert Mfg. Co.*, *supra*. Thus in the principal case no tort action should be allowed. But see *Moore* v. *Steljes*, (1895) 69 Fed. 518. The reasoning of *Thompson* v. *Clemens*, (1903) 96 Md. 196, apparently *contra*, fails to establish the breach of any duty other than that arising from contract. Assuming the existence of a duty and its violation by the landlord, the same test of negligence should be applied to the tenant to determine his contributory negligence. *Sanders* v. *Smith*, (N. Y. 1893) 5 Misc. 1. In the principal case both parties having equal knowledge of the conditions, the decision in favor of the tenant appears unsound." "Recent Decisions," 8 Columbia Law Review, 666. — ED.

When the plaintiff's costs were taken in to be taxed, the master was of opinion that, on the authority of *Taylor* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.*,[1] the act of the engine-driver being one of omission, the action was founded on contract, and that therefore the plaintiff was only entitled to costs on the county court scale. On appeal, this decision was affirmed by Day, J.

The plaintiff appealed.

Kemp, Q. C., and *Cagney*, for the plaintiff, submitted that the action was in fact an action of tort, and was tried as such, and that the plaintiff was entitled to costs on the High Court scale.

Lawson Walton, Q. C., and *George Elliott*, for the defendants. The duty of the defendants was contractual, and they were bound to take due care not to injure the plaintiff. The act which caused the injury was an omission to turn off steam, and amounted to a nonfeasance. It was not an act of commission or misfeasance, and the defendants were not liable in tort. The distinction is dealt with in the judgment of Lindley, L. J., and A. L. Smith, L. J., in *Taylor* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.*,[1] and the present case comes within that authority.

[They also cited *Foulkes* v. *Metropolitan District Ry. Co.*[2]]

[The opinion of Lord Esher, M. R., is omitted.]

A. L. Smith, L. J., read the following judgment: There appears to have been some misapprehension as to what was decided in the case of *Taylor* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.*,[3] to which I was a party.

The plaintiff in the present case was a passenger on the defendants' railway, and whilst lawfully riding in one of their carriages was injured by its being negligently run into a dead-end by the defendants' driver.

It has been thought by the master, and also by Day, J., that, because the negligence was that the driver omitted to turn off steam, this constituted a nonfeasance or omission within what was said in the above-mentioned case, and that as the plaintiff had recovered 25*l.* and no more he was only entitled to county court costs. I am clearly of opinion that this is not what was decided, nor is any such statement to be found in that judgment.

The distinction between acts of commission or misfeasance, and acts of omission or nonfeasance, does not depend on whether a driver or signalman of a defendant company has negligently turned on steam or negligently hoisted a signal, or whether he has negligently omitted to do the one or the other. The distinction is this, if the cause of complaint be for an act of omission or nonfeasance which without proof of a contract to do what has been left undone would not give rise to any cause of action (because no duty apart from con-

[1] *Ante*, p. 134. [2] 4 C. P. D. 267; 5 C. P. D. 157. [3] *Ante*, p. 134.

tract to do what is complained of exists), then the action is founded upon contract and not upon tort. If, on the other hand, the relation of the plaintiff and the defendants be such that a duty arises from that relationship, irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort, and as regards the County Court Acts and costs this is what was laid down in the above-mentioned case. The appeal should be allowed with costs here and below.

Rigby, L. J. I entirely agree. It appears to me that the attempt to dissect the act of the defendants' servant, and to treat the mere omission to turn off steam as a nonfeasance within the meaning of the cases referred to, altogether fails. An engine-driver is in charge of the train, and a passenger is in that train, independently of contract, with the permission of the defendants. That passenger is injured in consequence of the train being negligently brought into collision with the dead-end. The proper description of what was done is that it was a negligent act in so managing the train as to allow it to come into contact with the dead-end and so cause the accident. It is a case in which the company by their servant neglected a duty which they owed to the plaintiff — that is to say, it was a case in which an action of tort could be brought.

Appeal allowed.

FLINT & WALLING MANUFACTURING CO. *v.* BECKETT.

1906. 167 *Indiana*, 491.[1]

Beckett brought this action against the Flint & Walling Manufacturing Company to recover damages for harm done to his barn and the contents thereof, owing to the fact that the company constructed a windmill thereon in such an insufficient manner that it fell upon the roof of the barn.

The complaint contained, in substance, the following statements: —

There was an air-shaft in the centre of the barn, extending from the bottom to, and projecting through, the roof. Defendant contracted with plaintiff to erect on the air-shaft a windmill consisting of a wheel, tower, etc., to be erected in a first-class manner. The defendant erected the windmill in a negligent manner; especially in the mode of fastening the tower to the air-shaft. In consequence of this defective construction, a wind of ordinary velocity caused the windmill to break and twist the air-shaft and fall about sixty feet on the roof of the barn.

Trial in the Circuit Court. Verdict for plaintiff and judgment thereon. Defendant company appealed.

[1] Statement abridged. Part of opinion omitted. — Ed.

Chambers, Pickens, Moores & Davidson, and *Shirts & Fertig*, for appellants.

W. S. Christian and *W. J. Beckett*, for appellee.

GILLETT, J.

. . . . . .

The leading contention of appellant's counsel is that the duty it owed to appellee arose out of contract, and that, as appellant was not engaged in a public employment, its obligation could only be enforced by an action on the contract for a breach thereof. The latter insistence cannot be upheld. It is, of course, true that it is not every breach of contract which can be counted on as a tort, and it may also be granted that if the making of a contract does not bring the parties into such a relation that a common-law obligation exists, no action can be maintained in tort for an omission properly to perform the undertaking. It by no means follows, however, that this common-law obligation may not have its inception in contract. If a defendant may be held liable for the neglect of a duty imposed on him, independently of any contract, by operation of law, *a fortiori* ought he to be liable where he has come under an obligation to use care as the result of an undertaking founded on a consideration.

Where the duty has its roots in contract, the undertaking to observe due care may be implied from the relationship, and should it be the fact that a breach of the agreement also constitutes such a failure to exercise care as amounts to a tort, the plaintiff may elect, as the common-law authorities have it, to sue in case or in assumpsit. It is broadly stated in 1 Comyns' Digest, Action on the Case for Negligence, A 4, p. 418, that "if a man neglect to do that, which he has undertaken to do, an action upon the case lies. . . . But, if there be not any neglect in the defendant, an action upon the case does not lie against him, though he do not perform his undertaking." Professor Pollock says: "One who enters on the doing of anything attended with risk to the persons or property of others is held answerable for the use of a certain measure of caution to guard against that risk. To name one of the commonest applications, 'those who go personally or bring property where they know that they or it may come into collision with the persons or property of others have by law a duty cast upon them to use reasonable care and skill to avoid such collision.' . . . In some cases this ground of liability may coexist with a liability on contract towards the same person, and arising (as regards the breach) out of the same facts. Where a man interferes gratuitously, he is bound to act in a reasonable and prudent manner according to the circumstances and opportunities of the case. And this duty is not affected by the fact, if so it be, that he is acting for reward, in other words, under a contract, and may be liable on the contract. The two duties are distinct, except so far as the same party cannot be compensated twice over for the same facts, once for the breach of contract and again for the wrong. Historically the liability in tort is older;

and indeed it was by special development of this view that the action of assumpsit, afterwards the common mode of enforcing simple contracts, was brought into use. 'If a smith prick my horse with a nail, etc., I shall have my action upon the case against him, without any warranty by the smith to do it well. . . . For it is the duty of every artificer to exercise his art rightly and truly as he ought.'" Webb's Pollock, Torts, 533–536. This general thought also finds expression in Mr. Street's valuable work (1 Street, Foundations of Legal Liability, 92). It is there said: "The general doctrine may be laid down thus: In every situation where a man undertakes to act or to pursue a particular course he is under an implied legal obligation or duty to act with reasonable care, to the end that the person or property of others may not be injured by any force which he sets in operation or by any agent for which he is responsible. If he fails to exercise the degree of caution which the law requires in a particular situation, he is held liable for any damage that results to another just as if he had bound himself by an obligatory promise to exercise the required degree of care. In this view, statements so frequently seen in negligence cases, to the effect that men are bound to act with due and reasonable care, are really vital and significant expressions. If there had been any remedial necessity for so declaring, it could obviously have been said without violence to the principle that men who undertake to act are subject to a fictitious or implied promise to act with due care." See also, *Howard* v. *Shepherd*, (1850) 9 C. B. (67 Eng. Com. Law) 296, 321; *Coy* v. *Indianapolis Gas Co.*, (1897) 146 Ind. 655, 36 L. R. A. 535; *Parrill* v. *Cleveland, etc., R. Co.*, (1900) 23 Ind. App. 638; *Rich* v. *New York, etc., R. Co.*, (1882) 87 N. Y. 382; *Dean* v. *McLean*, (1875) 48 Vt. 412, 21 Am. Rep. 130; *Stock* v. *City of Boston*, (1889) 149 Mass. 410, 21 N. E. 871, 14 Am. St. 430; *Bickford* v. *Richards*, (1891) 154 Mass. 163, 27 N. E. 1014, 26 Am. St. 224; Addison, Torts (3d ed.), p. 13; 1 Thompson, Negligence (2d ed.), § 5; 1 Shearman & Redfield, Negligence (5th ed.), §§ 9, 22; Saunders, Negligence, 55, 121; 6 Cyc. Law and Proc. 688.

The position in which appellant placed this large and heavy structure, located, as it was, upon the barn, some seventy feet above the earth, was such that it was calculated to do great harm to appellee's property should it fall. We cannot doubt, in view of the terms of the contract, construed in the light of the practical construction which the parties gave to it, to say nothing of the extraneous agreement set forth in the complaint, that it was the duty of appellant to exercise ordinary care to secure the tower in such a manner that this heavy and exposed structure would not, under the action of ordinary winds, weave around and become detached from the body of the air-shaft. Insecurely fastened, as the complaint shows that this structure was, appellant was bound to apprehend that it might fall, and that, if it did, great injury would thereby be occasioned to appellee. It was also bound to apprehend, from the very care and skill which it im-

pliedly held itself out as exercising (a circumstance calculated to throw appellee off his guard), and from the fact that an examination was difficult, that in all probability the defects would not be observed in time to avoid the injury. Indeed, as laid down in *Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640, and *Devlin* v. *Smith*, (1882) 89 N. Y. 470, 42 Am. Rep. 311, appellee owed no duty, so far as appellant was concerned, to examine the tower. The contrivance was inherently dangerous, and the circumstances of placing it upon the barn, as shown, made it calculated to eventuate in harm. This being true, and as there was no intervening responsible agency between appellee and the wrong, so that the causal relation remained unbroken, we can perceive no reason for acquitting appellant of responsibility as a tort feasor. See Wharton, Negligence (2d ed.), § 438; 1 Beven, Negligence (2d ed.), 62; *Roddy* v. *Missouri Pac. R. Co.*, (1891) 104 Mo. 234, 15 S. W. 1112, 12 L. R. A. 746, 24 Am. St. 333. It is not necessary to consider the extent to which contracts may impose obligations to exercise care for the protection of third persons, for here the relation is direct and immediate, but we quote, as showing that there is clearly a liability in tort, in such a case as this, the following general statements in 1 Shearman & Redfield, Negligence (5th ed.), § 117, with reference to the liability for selling dangerous goods: "But one who knowingly sells an article intrinsically dangerous to human life or health, such as poison, explosive oils or diseased meat, concealing from the buyer knowledge of that fact, is responsible to any person who, without fault on the part of himself or any other person, sufficient to break the chain of causation, is injured thereby. And we see no reason why the same rule should not apply to articles known to be dangerous to property."

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A number of questions are argued by appellant's counsel which are based upon the contention that the theory of the complaint was that appellant had committed a breach of contract. The latter insistence is based on the fact that the contract is set out in full in the complaint. It is often difficult to determine whether, in the statement of such a cause of action as the one under consideration, wherein the very breach of the contract also constitutes negligence, the purpose of the pleader was to rely upon a breach of contract or to charge negligence in the violation of the implied duty which was created by the undertaking of the defendant. It is true that in an action on the case for negligence, wherein the declaration or complaint is not based on mere nonfeasance it is not necessary to plead a consideration, and, therefore, where the action is based on the manner in which an undertaking was performed, or, in other words, on some misfeasance or malfeasance, the allegation of a consideration may be regarded as one of the markings of an action *ex contractu*. But we do not understand that this is a controlling consideration; on the contrary, it does not appear to admit of question that if the contract or consideration be

set out as a matter of inducement only, the plaintiff's action may be regarded as one in case for a violation of the common-law duty which the circumstances had imposed upon the defendant. 1 Chitty, Pleading, *135; *Dickson* v. *Clifton*, 2 Wils. 319; Watson, Damages for Per. Inj., § 570; 21 Ency. Pl. and Pr., 913. We are especially impressed with the view that in code pleading, which was designed preëminently to be a system of fact pleading, a plaintiff, in suing in tort, may properly set out his contract, as constituting the underlying fact, instead of charging the defendant's undertaking in general terms, and that the plaintiff does not thereby necessarily commit himself to the theory that his action is for breach of contract. *Leeds* v. *City of Richmond*, (1885) 102 Ind. 372; *Parrill* v. *Cleveland, etc., R. Co., supra*; *McMurtry* v. *Kentucky Cent. R. Co.*, (1886) 84 Ky. 462, 1 S. W. 815; Watson, Damages for Per. Inj., § 570. In the complaint before us appellee not only sets out the written contract, but he pleads a supplemental or subsidiary agreement as well, so that it can hardly be said that he relied on the written contract as the foundation of the action. He charges no breach of the contract except as it can be implied from the allegations of negligence; he alleges damages "by reason of the defendant's negligence, carelessness, imprudence, and unskilfulness in erecting, constructing, and fastening said steel tower to said air-shaft as aforesaid;" he charges, in setting forth the total amount of his damages, that they were occasioned "by reason of the defendant's negligence and failure of duty as herein alleged," and he avers that he "had no notice or knowledge of the faulty, negligent, and unskilful erection of said mill," and that he himself was without fault or negligence in the premises. In view of the general structure of the complaint, and applying to it the rule that a construction of a pleading which will give effect to all of its material allegations is to be preferred, where reasonably possible (*Monnett* v. *Turpie*, [1892] 133 Ind. 424), it appears to us that it must be held that the action was for the tort. But, admitting that there is room for doubt on this subject, the fact that the court below, as the record plainly shows, tried the cause on the theory that it was an action *ex delicto*, must settle the question against the contention of appellant. *Lake Erie, etc., R. Co.* v. *Acres*, (1886) 108 Ind. 548; *Diggs* v. *Way*, (1899) 22 Ind. App. 617.

. . . . . .

Judgment affirmed.

SECTION IV.

Legal Duty.

REX *v.* WILLIAM SMITH, ET ALS.

1826. 2 *Carrington & Payne*, 449.[1]

THE first count of the indictment alleged, in substance, that George Smith was an idiot, and under the care, custody, and control of the respondents, William, Thomas, and Sarah Smith; that the respondents assaulted said George; that they unlawfully kept, confined, and imprisoned him in a dark, cold, and unwholesome room; that they unlawfully neglected and refused to give sufficient victuals and clothing; and that they kept him without sufficient and proper air, warmth, and exercise necessary for his health; whereby the said George became weak and sick.

There were also counts alleging George to be under the care, custody, and control of William Smith; and other counts not alleging that he was in the care of any person.

Plea, not guilty.

From the evidence on the part of the prosecution, it appeared that George Smith, who was upwards of forty years of age, had always been an idiot, and had been bedridden for some years; and that his father, at his decease, had left him an annuity charged on his real property. The defendants were the brothers and sister of George Smith; and in consequence of some information, the Rev. W. D. Broughton, a magistrate, and other persons, went to the house of William Smith in the month of January, 1826, and saw the other defendants; they asked to see the idiot, and were told by Sarah Smith, in the presence of Thomas Smith, that he was locked up, and that W. Smith, who was absent, had the key. However, Mr. Broughton, and those who accompanied him, went upstairs, and on opening a door, which was not locked, they found George Smith on a bed of chaff, covered with a blanket and a great coat. The window of the room

[1] Statement condensed; part of argument omitted. — ED.

was bricked up and the floor of it in a filthy state; and though the weather was extremely cold, there was no appearance that there had been any fire in the room. From this place he was conveyed to the Stafford Lunatic Asylum, where his limbs were found to be in a contracted state, so that he could not stand or move about.

Campbell, for defendants. The present indictment states, that this idiot was in the care, custody, and control of the defendants. Now, a child is in the care of its parent, and that raises a duty to provide for it; but the relation of brother and brother does not raise any such duty, and for this purpose the parties were absolute strangers. How can George Smith be said to be under the care, custody, or control of either of the defendants? An idiot may be as helpless as a child of tender years; but George Smith was more than twenty-one years of age, and there is nothing to show that there was a duty raised in any other to take care of him. The indictment alleges that they kept him in a dark, unwholesome room, and neglected and refused to administer to him sufficient meat, drink, &c. for his support, and did keep him without proper air, &c. All this is non-feasance, and there is not the slightest evidence of malfeasance, and certainly no evidence of any assault. There may be evidence that he was not properly taken care of. If he had been found a lunatic, and the defendants had been his committees, that would raise a duty in them to take care of him. But if a person is alleged to be an idiot, it may be the duty of his nearest relations to take care of him; but that would be what the moralists call a duty of imperfect obligation. To support any of the counts except the last it must be shown that, either by contract or by law, there was a duty in the defendants to maintain and take care of their brother. If they did not maintain their brother could any action be brought against them? Certainly not. Now, can there be a case of any breach of duty where no action is maintainable. The duty can only arise by contract or by act of law. The former there is no pretence for, and as to the latter, he was not their child nor were they his committees.

Whateley, on the same side. To support this indictment, it is not sufficient that there should be a moral obligation in the defendants to maintain this unfortunate person, but there must be a legal one, such as arises from the relation of parent and child, or husband and wife, or master and servant.

Taunton, for the prosecution. It is said in this case that there was no legal obligation on the defendants. I submit that there was; and unfortunate would be the situation of such wretched beings if there were not. A brother may not be bound to take care of a brother if the father be living; but if two brothers and a sister have received as an inmate another brother who is an idiot, and have, in point of fact, that brother under their care and control, though this was in the first instance voluntary, the law throws on them the necessity of taking proper care of him.

Russell, on the same side. Mr. Campbell has said that there is no

legal obligation between brother and brother. Suppose a father to die and leave two sons, one thirty years old, the other two; and if, by the neglect of the elder, the younger died while residing in his house, would he not be answerable for murder? Indeed, if it were not so any one on whom the care of a lunatic or infant brother devolved might get his money improperly, and then starve him to death with impunity.

Campbell, in reply. The question is, whether there was a legal obligation on the defendants, for mere non-feasance is only indictable when there is a liability and a neglect of a duty. In malfeasance a positive act is done. Mr. Justice Lawrence made the distinction in the broadest way in the case of *Rex* v. *Ridley*. In that case there was non-feasance and malfeasance, and the learned judge expressly distinguishes between the two. The defendants are said to have had George Smith in their care, custody, and control; now there is no evidence that they were his committees, or that they were under any legal liability to maintain him. And further, how does it at all appear that they had any right to prevent his going away? If the people at the lunatic asylum had persuaded George Smith to leave the house, the defendants could have brought no action against them for getting him away. So far from that, could not the defendants have carried him to the workhouse? Nay, if they had been hard-hearted enough, they might have insisted on his going there.[1]

BURROUGH, J. I am clearly of opinion that, on the facts proved, there is no assault and no imprisonment in the eye of the law, and all the rest of the charge is non-feasance. In the case of *Squires* and his wife for starving the apprentice, the husband was convicted, because it was his duty to maintain the apprentice, and the wife was acquitted, because there was no such obligation on her. I expected to have found in the will of the father that the defendants were bound, if they took the father's property, to maintain this brother; but under the will they are only bound to pay him £50 a year, and not bound to maintain him. William Smith appears to have been the owner of the house, and Thomas and Sarah were mere inmates of it, as their idiot brother might be; as to these latter, there could clearly be no legal obligation on them; and how can I tell the jury that either of the defendants had such a care of this unfortunate man as to make them criminally liable for omitting to attend to him. There is strong proof that there was some negligence; but my point is, that omission without a duty will not create an indictable offence. There is a deficiency of proof of the allegation of care, custody, and control, which must be

[1] It is worthy of remark, that the stat 43 Eliz. c. 2, which enacts, that the father, grandfather, mother, grandmother, and children of a poor person being of sufficient ability, shall maintain such poor person, under penalty of 20*s.* for every month they shall fail to do so, does not extend to one brother maintaining another. So that if a man were in a workhouse his brother would not be compellable to contribute anything towards his support, however able to do so.

taken to be legal care, custody, and control. Whether an indictment might be so framed as to suit this case, I do not know; but on this indictment I am clearly of opinion that the defendants must be acquitted. *Verdict — Not guilty.*

REGINA *v.* INSTAN.

1893. 17 *Cox's Criminal Law Cases*, 602.

CASE stated for the opinion of the court by Day, J.

The prisoner was indicted for feloniously killing Ann Hunt.

From the facts stated in the case, it appeared that the prisoner, who was unmarried and had no means of her own, lived with and was maintained by her aunt, the deceased Ann Hunt, a woman of seventy-three years of age, possessed of a small life income. Until a few weeks before her death the deceased was healthy and able to take care of herself. No one lived in the house with or attended to the deceased but the prisoner. Shortly before her death the deceased suffered from gangrene in the leg, which rendered her during the last ten days of her life quite unable to attend to herself or to move about, or to do anything to procure assistance.

No one but the prisoner had, previously to the death of the deceased, any knowledge of her condition. The prisoner continued to live in the house at the cost of the deceased, and took in the food supplied by the tradespeople. She did not give nor procure any medical or nursing attendance to or for the deceased, nor did she give notice to any neighbor of her condition or wants, although she had abundant opportunity and occasion to do so.

The body of the deceased was, on the 2d day of August, while the prisoner was still living in the house, found much decomposed, partially dressed in her day clothes, and lying partly on the ground and partly prone upon the bed. The cause of death was exhaustion caused by the gangrene, but substantially accelerated by neglect, want of food, of nursing, and of medical attendance during several days previously to the death. All these wants could and would have been supplied if any notice of the condition of the deceased had been given by the prisoner to any of the neighbors, of whom there were several living in adjoining houses, or to the relations of the deceased who lived within a few miles.

The learned judge left it to the jury to say, having regard to the circumstances under which the prisoner lived with the deceased and continued to occupy the house and to take the food provided at the expense of the deceased, while the deceased was, as she knew, unable to procure necessaries for herself, whether the prisoner did or did not impliedly undertake with the deceased either to wait upon and attend

to her herself or to communicate to persons outside the house the knowledge of her helpless condition, and directed the jury that if they came to the conclusion that the prisoner did so undertake, and that the death of the deceased was substantially accelerated by her failure to carry out such undertaking, they might find the prisoner guilty of manslaughter, but that otherwise they should acquit her.

The jury found the prisoner guilty.

Vachell, for the prisoner, submitted that the facts stated in the case showed that the deceased was the head of the household of which the prisoner was only a member. There was no duty on the part of the prisoner, either at common law or by contract, to attend to the deceased, who was a person of full age and capable of taking care of herself. In *Reg.* v. *Friend*, R. & R., p. 20, the deceased was an apprentice and of tender years, who had a right to his master's protection and assistance. The case of *Reg.* v. *Shepherd*, L. & C. 147, showed that unless there is a duty to provide a necessary of life for another arising either by statute or by contract or at common law, the neglect to provide such necessary does not amount to manslaughter. He also cited *Reg.* v. *Marriott*, 8 C. & P. 425.

No counsel appeared for the Crown.

The judgment of the court (Lord Coleridge, C. J., Hawkins, Cave, Day, and Collins, JJ.) was delivered by

Lord COLERIDGE, C. J. It is not correct to say that every moral obligation is a legal duty, but every legal duty is founded upon a moral obligation. In this case, as in most cases, the legal duty can be nothing else than taking upon one's self the performance of the moral obligation. There is no question whatever that it was this woman's clear duty to impart to the deceased so much of that food which was taken into the house for both and paid for by the deceased as was necessary to sustain her life. The deceased could not get it for herself, she could only get it through the prisoner. It was the prisoner's clear duty at common law to supply it to the deceased, and that duty she did not perform. Nor is there any question that the prisoner's failure to discharge her legal duty, if it did not directly cause, at any rate accelerated the death of the deceased. There is no case directly on the point, but it would be a slur and a stigma upon our law if there could be any doubt as to the law to be derived from the principle of decided cases, if cases were necessary. There was a clear moral obligation, and a legal duty founded upon it; a duty wilfully disregarded, and the death was at least accelerated, if not caused, by the non-performance of the legal duty. I am therefore of opinion and I express the opinion of all my brethren — that the evidence confirmed all that it was necessary to show, and that the conviction was proper and must be upheld.

Conviction affirmed.

UNION PACIFIC R. R. CO. *v.* CAPPIER.

1903. 66 *Kansas*, 649.

ERROR from Wyandotte District Court.

N. H. Loomis, R. W. Blair, and *H. A. Scandrett,* for plaintiff in error.

C. W. Trickett, for defendant in error.

SMITH, J. This was an action brought by Adeline Cappier, the mother of Irvin Ezelle, to recover damages resulting to her by reason of the loss of her son, who was run over by a car of plaintiff in error, and died from the injuries received. The trial court, at the close of the evidence introduced to support a recovery by plaintiff below, held that no careless act of the railway company's servants in the operation of the car was shown, and refused to permit the case to be considered by the jury on the allegations and attempted proof of such negligence. The petition, however, contained an averment that the injured person had one leg and an arm cut off by the car-wheels, and that the servants of the railway company failed to call a surgeon, or to render him any assistance after the accident, but permitted him to remain by the side of the tracks and bleed to death. Under this charge of negligence a recovery was had.

While attempting to cross the railway tracks Ezelle was struck by a moving freight-car pushed by an engine. A yardmaster in charge of the switching operations was riding on the end of the car nearest to the deceased and gave warning by shouting to him. The warning was either too late or no heed was given to it. The engine was stopped. After the injured man was clear of the track, the yardmaster signalled the engineer to move ahead, fearing, as he testified, that a passenger train then about due would come upon them. The locomotive and car went forward over a bridge, where the general yardmaster was informed of the accident and an ambulance was summoned by telephone. The yardmaster then went back where the injured man was lying and found three Union Pacific switchmen binding up the wounded limbs and doing what they could to stop the flow of blood. The ambulance arrived about thirty minutes later and Ezelle was taken to a hospital, where he died a few hours afterward.

In answer to particular questions of fact, the jury found that the accident occurred at 5.35 P. M.; that immediately one of the railway employees telephoned to police headquarters for help for the injured man; that the ambulance started at 6.05 P. M. and reached the nearest hospital with Ezelle at 6.20 P. M., where he received proper medical and surgical treatment. Judgment against the railway company was based on the following question and answer: —

"Ques. Did not defendant's employees bind up Ezelle's wounds and try to stop the flow of blood as soon as they could after the accident happened? Ans. No."

The lack of diligence in the respect stated was intended, no doubt, to apply to the yardmaster, engineer, and fireman in charge of the car and engine.

These facts bring us to a consideration of the legal duty of these employees toward the injured man after his condition became known. Counsel for defendant in error quotes the language found in Beach on Contributory Negligence, third edition, section 215, as follows: —

"Under certain circumstances, the railroad may owe a duty to a trespasser after the injury. When a trespasser has been run down, it is the plain duty of the railway company to render whatever service is possible to mitigate the severity of the injury. The train that has occasioned the harm must be stopped, and the injured person looked after; and, when it seems necessary, removed to a place of safety, and carefully nursed, until other relief can be brought to the disabled person."

The principal authority cited in support of this doctrine is *Northern Central Railway Co.* v. *The State, use of Price et al.*, 29 Md. 420, 96 Am. Dec. 545. The court in that case first held that there was evidence enough to justify the jury in finding that the operatives of the train were negligent in running it too fast over a road-crossing without sounding the whistle, and that the number of brakemen was insufficient to check its speed. Such negligence was held sufficient to uphold the verdict, and would seem to be all that was necessary to be said. The court, however, proceeded to state that, from whatever cause the collision occurred, it was the duty of the servants of the company, when the man was found on the pilot of the engine in a helpless and insensible condition, to remove him, and to do it with proper regard to his safety and the laws of humanity. In that case the injured person was taken in charge by the servants of the railway company and, being apparently dead, without notice to his family, or sending for a physician to ascertain his condition, he was moved to defendant's warehouse, laid on a plank and locked up for the night. The next morning, when the warehouse was opened, it was found that during the night the man had revived from his stunned condition and moved some paces from the spot where he had been laid, and was found in a stooping posture, dead but still warm, having died from hemorrhage of the arteries of one leg, which was crushed at and above the knee. It had been proposed to place him in the defendant's station-house, which was a comfortable building, but the telegraph operator objected, and directed him to be taken into the warehouse, a place used for the deposit of old barrels and other rubbish.

The Maryland case does not support what is so broadly stated in Beach on Contributory Negligence. It is cited by Judge Cooley, in his work on Torts, in a note to a chapter devoted to the negligence of

bailees (ch. xx), indicating that the learned author understood the reasoning of the decision to apply where the duty began after the railway employees had taken charge of the injured person.

After the trespasser on the track of a railway company has been injured in collision with a train, and the servants of the company have assumed to take charge of him, the duty arises to exercise such care in his treatment as the circumstances will allow. We are unable, however, to approve the doctrine that when the acts of a trespasser himself result in his injury, where his own negligent conduct is alone the cause, those in charge of the instrument which inflicted the hurt, being innocent of wrong-doing, are nevertheless blamable in law if they neglect to administer to the sufferings of him whose wounds we might say were self-imposed. With the humane side of the question courts are not concerned. It is the omission or negligent discharge of legal duties only which come within the sphere of judicial cognizance. For withholding relief from the suffering, for failing to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men, but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant act is swift and sure. In the law of contracts it is now well understood that a promise founded on a moral obligation will not be enforced in the courts. Bishop states that some of the older authorities recognize a moral obligation as valid, and says: —

"Such a doctrine, carried to its legitimate results, would release the tribunals from the duty to administer the law of the land; and put, in the place of law, the varying ideas of morals which the changing incumbents of the bench might from time to time entertain." (Bish. Cont. sect. 44.)

Ezelle's injuries were inflicted, as the court below held, without the fault of the yardmaster, engineer, or fireman in charge of the car and locomotive. The railway company was no more responsible than it would have been had the deceased been run down by the cars of another railroad company on a track parallel with that of plaintiff in error. If no duty was imposed on the servants of defendant below to take charge of, and care for, the wounded man in such a case, how could a duty arise under the circumstances of the case at bar? In Barrows on Negligence, page 4, it is said: —

"The duty must be owing from the defendant to the plaintiff, otherwise there can be no negligence, so far as the plaintiff is concerned; . . . and the duty must be owing to plaintiff in an individual capacity, and not merely as one of the general public.

"This excludes from actionable negligence all failures to observe the obligations imposed by charity, gratitude, generosity, and the kindred virtues. The moral law would obligate an attempt to rescue a person in a perilous position, — as a drowning child, — but the law of the land does not require it, no matter how little personal risk it might involve,

provided that the person who declines to act is not responsible for the peril." (See, also, *Kenney* v. *The Hannibal & St. Joseph Railroad Company*, 70 Mo. 252, 257.)

In the several cases cited in the brief of counsel for defendant in error to sustain the judgment of the trial court, it will be found that the negligence on which recoveries were based occurred after the time when the person injured was in the custody and care of those who were at fault in failing to give him proper treatment.

The judgment of the court below will be reversed, with directions to enter judgment on the findings of the jury in favor of the railway company.

All the justices concurring.[1]

BLACK *v.* NEW YORK, NEW HAVEN, AND HARTFORD R. R. CO.

1907. 193 *Massachusetts*, 448.

TORT for personal injuries alleged to have been caused by the negligence of the servants of the defendant on February 7, 1903, while the plaintiff was a passenger of the defendant. Writ dated March 20, 1903.

At the trial in the Superior Court, Wait, J., at the close of the plaintiff's evidence ordered a verdict for the defendant; and the plaintiff alleged exceptions. The material evidence is described or quoted in the opinion.

H. W. Dunn (*C. H. Walker* with him), for the plaintiff.

J. L. Hall, for the defendant.

KNOWLTON, C. J. This action was brought to recover for an injury alleged to have been caused by the negligence of the defendant's servants. The plaintiff was a passenger on the defendant's train, which ran from Boston through Ashmont on the evening of February 7, 1903. He testified to having become so intoxicated that he had no recollection of anything that occurred after leaving a cigar store in Boston, until he awoke in the Boston City Hospital, about four o'clock the next day. One Thompson testified "that he took the 9.23 train on the evening of February 7, 1903, at the South Station in Boston for Ashmont, and occupied a seat near the rear of the last car of the train; that there were about twenty passengers in the car, and he noticed Black sitting in the seat opposite, very erect, with his eyes closed. When the conductor came through, Mr. Black went through

[1] Compare *Griswold* v. *R. R.*, 183 Mass. 434, with *Whitesides* v. *R. R.*, 128 North Carolina, 229.

See Professor Bohlen, 56 University of Pennsylvania Law Review, 316–338, and Professor Ames, 22 Harvard Law Review, 112, 113. — ED.

his pockets as if he were looking for a ticket, and not being able to find it, tendered a fifty-cent piece in payment for his fare. The conductor began to name off the stations from Field's Corner first and then Ashmont, and when he said 'Ashmont,' Mr. Black nodded his head. The conductor gave him his change and his rebate check. At Ashmont, where the train stops, there is a gravelled walk, running the whole length, as a platform, then there is a flight of steps, ten or twelve, that leads up to the asphalt walk around the station, so when you go up from the steps you have to walk along this walk. The conductor and brakeman took Black out of the car, with one on each side. The distance from the steps of the car to the steps that lead up to the station was twenty-five feet. As they went along the platform, the conductor and trainman were on each side of him. They tried to stand him up, but his legs would sink away from him. They sort of helped him up and carried him to the bottom of the steps. When they went to the bottom of the steps, they continued, one on each side of him. Then one of the men got on one side with his arm around him and the other back of him sort of pushing him, and they took him up about the fifth or sixth step, and after they got him up there, they turned right around and left him and went down the steps. Mr. Black sort of balanced himself there just a minute and then fell completely backward. He turned a complete somersault and struck on the back of his head. The railroad men just had time to get down to the foot of the steps. There was a railing that led up those steps and the steps were about ten feet wide. Mr. Black was upon the right-hand side going up and he was left right near the railing. When he fell, he did not seize hold of anything, his arms were at his side."

On this testimony the jury might find that the plaintiff was so intoxicated as to be incapable of standing, or walking, or caring for himself in any way, and that the defendant's servants, knowing his condition, left him halfway up the steps where they knew, or ought to have known, that he was in great danger of falling and being seriously injured. They were under no obligation to remove him from the car, or to provide for his safety after he left the car. But they voluntarily undertook to help him from the car, and they were bound to use ordinary care in what they did that might affect his safety. Not only in the act of removal, but in the place where they left him, it was their duty to have reasonable regard for his safety in view of his manifest condition. The jury might have found that they were negligent in leaving him on the steps, where a fall would be likely to do him much harm. *Moody* v. *Boston & Maine Railroad*, 189 Mass. 277.

The defence rests principally upon the fact that the plaintiff was intoxicated, and was incapable of caring for himself after he was taken from the train, and therefore was not in the exercise of due care. If his voluntary intoxication was a direct and proximate cause of the injury, he cannot recover. The plaintiff contends that it was

not a cause, but a mere condition, well known to the defendant's servants, and that their act was the direct and proximate cause of the injury, with which no other act or omission had any causal connection. The distinction here referred to is well recognized in law.

[After a full discussion, the learned Judge concludes as follows:—]

We are of opinion that the jury in the present case might have found that the plaintiff was free from any negligence that was a direct and proximate cause of the injury.

Exceptions sustained.

DEPUE *v.* FLATAU.

1907. 100 *Minnesota*, 299.

ACTION in the District Court for Watonwan County to recover $5000 for personal injuries. The case was tried before *Lorin Cray*, J., who, at the conclusion of plaintiff's testimony, dismissed the action. From an order denying a motion for a new trial, plaintiff appealed. Reversed.

J. E. Haycraft and *W. S. Hammond*, for appellant.

Pfau & Pfau, *C. J. Laurisch*, and *Edward C. Farmer*, for respondents.

BROWN, J. The facts in this somewhat unusual case are as follows: Plaintiff was a cattle buyer, and accustomed to drive through the country in the pursuit of his business, buying cattle, hides, and furs from the farmers. On the evening of January 23, 1905, about five or 5.30 o'clock, after having been out a day or two in the country, he called at the house of defendants, about seven miles from Madelia, where he resided. His object was to inspect some cattle which Flatau, Sr., had for sale, and if arrangements could be made to purchase the same. It was dark at the time of his arrival, but he inspected the cattle in the barn, and suggested to defendant that, being unable to determine their value by reason of the darkness, he was not prepared to make an offer for the cattle, and requested the privilege of remaining over night, to the end that a bargain might be made understandingly in the morning. His request was not granted. Plaintiff then bought some furs from other members of defendants' family, and Flatau, Sr., invited him to remain for supper. Under this invitation plaintiff entered the house, paid for the furs, and was given supper with the family. After the evening meal, plaintiff and both defendants repaired to the sitting-room of the house, and plaintiff made preparation to depart for his home. His team had not been unhitched from the cutter, but was tied to a hitching post near the house. The testimony from this point leaves the facts in some doubt. Plaintiff testified that soon after reaching the sitting-room he was

taken with a fainting spell and fell to the floor. He remembers very little of what occurred after that, though he does recall that, after fainting, he again requested permission to remain at defendants' over night, and that his request was refused. Defendants both deny that this request was made, and testified, when called for cross-examination on the trial, that plaintiff put on his overshoes and buffalo coat unaided, and that, while adjusting a shawl about his neck, he stumbled against a partition between the dining-room and the sitting-room, but that he did not fall to the floor. Defendant Flatau, Jr., assisted him in arranging his shawl, and the evidence tends to show that he conducted him from the house out of doors and assisted him into his cutter, arranging the robes about him and attending to other details preparatory to starting the team on its journey. Though the evidence is somewhat in doubt as to the cause of plaintiff's condition while in defendants' home, it is clear that he was seriously ill and too weak to take care of himself. He was in this condition when Flatau, Jr., assisted him into the cutter. He was unable to hold the reins to guide his team, and young Flatau threw them over his shoulders and started the team towards home, going a short distance, as he testified, for the purpose of seeing that the horses took the right road to Madelia. Plaintiff was found early next morning by the roadside, about three quarters of a mile from defendants' home, nearly frozen to death. He had been taken with another fainting spell soon after leaving defendants' premises, and had fallen from his cutter, where he remained the entire night. He was discovered by a passing farmer, taken to his home, and revived. The result of his experience necessitated the amputation of several of his fingers, and he was otherwise physically injured and his health impaired. Plaintiff thereafter brought this action against defendants, father and son, on the theory that his injuries were occasioned solely by their negligent and wrongful conduct in refusing him accommodations for the night, and, knowing his weak physical condition, or at least having reasonable grounds for knowing it, by reason of which he was unable to care for himself, in sending him out unattended to make his way to Madelia the best he could. At the conclusion of plaintiff's case, the trial court dismissed the action, on the ground that the evidence was insufficient to justify a recovery. Plaintiff appealed from an order denying a new trial.

Two questions are presented for consideration: (1) Whether, under the facts stated, defendants owed any duty to plaintiff which they negligently violated; and (2) whether the evidence is sufficient to take the case to the jury upon the question whether defendants knew, or under the circumstances disclosed ought to have known, of his weak physical condition, and that it would endanger his life to send him home unattended.

The case is an unusual one on its facts, and "all-four" precedents are difficult to find in the books. In fact, after considerable research,

we have found no case whose facts are identical with those at bar. It is insisted by defendants that they owed plaintiff no duty to entertain him during the night in question, and were not guilty of any negligent misconduct in refusing him accommodations, or in sending him home under the circumstances disclosed. Reliance is had for support of this contention upon the general rule as stated in note to *Union Pacific* v. *Cappier*, [66 Kan. 649, 72 Pac. 281] 69 L. R. A. 513, where it is said: "Those duties which are dictated merely by good morals or by humane considerations are not within the domain of the law. Feelings of kindliness and sympathy may move the Good Samaritan to minister to the needs of the sick and wounded at the roadside, but the law imposes no such obligation; and suffering humanity has no legal complaint against those who pass by on the other side. . . . Unless, therefore, the relation existing between the sick, helpless, or injured and those who witness their distress is such that the law imposes the duty of providing the necessary relief, there is neither obligation to minister on the one hand, nor cause for legal complaint on the other." This is no doubt a correct statement of the general rule applicable to the Good Samaritan, but it by no means controls a case like that at bar.

The facts of this case bring it within the more comprehensive principle that whenever a person is placed in such a position with regard to another that it is obvious that, if he does not use due care in his own conduct, he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation in which he thus finds himself, and with which he is confronted, to avoid such danger; and a negligent failure to perform the duty renders him liable for the consequences of his neglect.

This principle applies to varied situations arising from non-contract relations. It protects the trespasser from wanton or wilful injury. It extends to the licensee, and requires the exercise of reasonable care to avoid an unnecessary injury to him. It imposes upon the owner of premises, which he expressly or impliedly invites persons to visit, whether for the transaction of business or otherwise, the obligation to keep the same in reasonably safe condition for use, though it does not embrace those sentimental or social duties often prompting human action. 21 Am. & Eng. Enc. (2d Ed.) 471; Barrows, Neg. 4. Those entering the premises of another by invitation are entitled to a higher degree of care than those who are present by mere sufferance. Barrows, Neg. 304. The rule stated is supported by a long list of authorities, both in England and this country, and is expressed in the familiar maxim, "Sic utere tuo," etc. They will be found collected in the works above cited, and also in 1 Thompson, Neg. (2d Ed.) § 694. It is thus stated in *Heaven* v. *Pender*, L. R. 11 Q. B. Div. 503: "The proposition which these recognized cases suggest, and which is, therefore, to be deduced from them, is that, whenever one person is by circumstances placed in such a position with regard to another that every

one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." It applies with greater strictness to conduct towards persons under disability, and imposes the obligation as a matter of law, not mere sentiment, at least to refrain from any affirmative action that might result in injury to them. A valuable note to *Union Pacific* v. *Cappier*, 69 L. R. A. 513, discusses at length the character of the duty and obligation of those coming into relation with sick and disabled persons, and numerous analogous cases are collected and analyzed.

In the case at bar defendants were under no contract obligation to minister to plaintiff in his distress; but humanity demanded that they do so, if they understood and appreciated his condition. And, though those acts which humanity demands are not always legal obligations, the rule to which we have adverted applied to the relation existing between these parties on this occasion and protected plaintiff from acts at their hands that would expose him to personal harm. He was not a trespasser upon their premises, but, on the contrary, was there by the express invitation of Flatau, Sr. He was taken suddenly ill while their guest, and the law, as well as humanity, required that he be not exposed in his helpless condition to the merciless elements.

The case, in its substantial facts, is not unlike that of *Cincinnati* v. *Marrs' Adm'x*, 27 Ky. Law, 388, 85 S. W. 188, 70 L. R. A. 291. In that case it appears that one Marrs was found asleep in the yards of the railway company in an intoxicated condition. The yard employees discovered him, aroused him from his stupor, and ordered him off the tracks. They knew that he was intoxicated, and that he had left a train recently arrived at the station, and he appeared to them dazed and lost. About forty minutes later, while the yard employees were engaged in switching, they ran over him and killed him. He had again fallen asleep on one of the tracks. The court held the railway company liable; that, under the circumstances disclosed, it was the duty of the yard employees to see that Marrs was safely out of the yards, or, in default of that, to exercise ordinary care to avoid injuring him; and that it was reasonable to require them to anticipate his probable continued presence in the yards. The case at bar is much stronger, for here plaintiff was not intoxicated, nor a trespasser, but, on the contrary, was in defendants' house as their guest, and was there taken suddenly ill in their presence, and, if his physical condition was known and appreciated, they must have known that to compel him to leave their home unattended would expose him to serious danger.

We understand from the record that the learned trial court held in harmony with the view of the law here expressed, but dismissed the action for the reason, as stated in the memorandum denying a new trial, that there was no evidence that either of the defendants knew,

or in the exercise of ordinary care should have known, plaintiff's physical condition, or that allowing him to proceed on his journey would expose him to danger. Of course, to make the act of defendants a violation of their duty in the premises, it should appear that they knew and appreciated his serious condition. The evidence on this feature of the case is not so clear as might be desired, but a majority of the court are of opinion that it is sufficient to charge both defendants with knowledge of plaintiff's condition — at least, that the question should have been submitted to the jury.

Defendant Flatau, Sr., testified that he was in the room at all times while plaintiff was in the house and observed his demeanor, and, though he denied that plaintiff fell to the floor in a faint or otherwise, yet the fact that plaintiff was seriously ill cannot be questioned. Flatau, Jr., conducted him to his cutter, assisted him in, observed that he was incapable of holding the reins to guide his team, and for that reason threw them over his shoulders. If defendants knew and appreciated his condition, their act in sending him out to make his way to Madelia the best he could was wrongful and rendered them liable in damages. We do not wish to be understood as holding that defendants were under absolute duty to entertain plaintiff during the night. Whether they could conveniently do so does not appear. What they should or could have done in the premises can only be determined from a full view of the evidence disclosing their situation, and their facilities for communicating his condition to his friends, or near neighbors, if any there were. (All these facts will enable the jury to determine whether, within the rules of negligence applicable to the case, defendants neglected any duty they owed plaintiff.)

Order reversed.

[It has repeatedly been proposed to amend the common law by legislation, so that certain duties hitherto regarded as merely moral obligations shall hereafter be legal duties, whose non-performance shall be punished by criminal law. The contention is, that the law should, to a certain extent, compel active beneficence by one man towards another in cases where "the only relation between the parties is that both are human beings." While it is not usually claimed that the law should recognize and enforce "a general duty to act as a good Samaritan," it is asserted that the law should recognize *some* humanitarian duties as legal duties.

For recent discussion of these subjects, see Professor Bohlen on "The Moral Duty to Aid Others as a Basis of Tort Liability," 56 *University of Pennsylvania Law Review*, 217 and 316; also Professor Ames on "Law and Morals," 22 *Harvard Law Review*, 97, pp. 111–113.

We give here: —

(1) A statute which has been enacted.

(2) Bentham's proposals for legislation.

(3) An Article in Livingston's Draft Code for Louisiana.

(4) Macaulay's elaborate statement of reasons for refusing to incorporate in the Indian Penal Code such views as Bentham's and Livingston's. — Ed.]

DUTCH PENAL CODE.

By Art. 450 of the Dutch Penal Code, he who, seeing another person suddenly threatened with the danger of death, omits to give or furnish him with assistance, which he can give or procure without any reasonable fear of danger for himself or others, is punished, if the death of the person in distress has resulted, with three months' imprisonment and fine. — H. A. D. Phillips on Comparative Criminal Jurisprudence, Introduction, p. 5.

BENTHAM'S PROPOSALS.

From Specimen of a Penal Code.

There is simple corporal injury, when, without lawful cause, an individual, seeing another in danger, abstains from helping him, and the evil happens in consequence.

Explanations: — *Abstains from helping him.*

Every man is bound to assist those who have need of assistance, if he can do it without exposing himself to sensible inconvenience. This obligation is stronger in proportion as the danger is the greater for the one, and the trouble of preserving him the less for the other. Such would be the case of a man sleeping near the fire, and an individual seeing the clothes of the first catch fire, and doing nothing towards extinguishing them: the crime would be greater if he refrained from acting not simply from idleness, but from malice or some pecuniary interest. — 1 Bentham's Complete Works, edition 1859, p. 164.

As to the rules of beneficence, these, as far as concerns matters of detail, must necessarily be abandoned in great measure to the jurisdiction of private ethics. . . .

The limits of the law on this head seem, however, to be capable of being extended a good deal farther than they seem ever to have been extended hitherto. In particular, in cases where the person is in danger, why should it not be made the duty of every man to save another from mischief, when it can be done without prejudicing himself, as well as to abstain from bringing it on him. This accordingly is the idea pursued in the body of the work.[1] — Bentham's Introduction to *The Principles of Morals and Legislation*, chapter xix, section 1, paragraph xix. 1 Bentham's Complete Works, edition 1859, pp. 147–148.

[1] A woman's head-dress catches fire: water is at hand: a man, instead of assisting to quench the fire, looks on and laughs at it. A drunken man, falling with his face downwards into a puddle, is in danger of suffocation: lifting his head a little on one side would save him: another man sees this and lets him lie. A quantity of gunpowder lies scattered about a room: a man is going into it with a lighted candle: another, knowing this, lets him go in without warning. Who is there that in any of these cases would think punishment misapplied ?

As to beneficence, some distinctions are necessary. The law may be extended to general objects, such as the care of the poor; but, for details, it is necessary to depend upon private morality. . . .

However, instead of having done too much in this respect, legislators have not done enough. They ought to erect into an offence the refusal or the omission of a service of humanity when it would be easy to render it, and when some distinct ill clearly results from the refusal; such, for example, as abandoning a wounded man in a solitary road without seeking any assistance for him; not giving information to a man who is negligently meddling with poisons; not reaching out the hand to one who has fallen into a ditch from which he cannot extricate himself; in these, and other similar cases, could any fault be found with a punishment, exposing the delinquent to a certain degree of shame, or subjecting him to a pecuniary responsibility for the evil which he might have prevented. — *Theory of Legislation*, compiled by Dumont from the manuscripts of Bentham; originally published in French; translated by Hildreth; 5th edition. London, 1887, pp. 65, 66.

LIVINGSTON'S DRAFT CODE.

Article 484. Homicide by omission only, is committed by voluntarily permitting another to do an act that must, in the natural course of things, cause his death, without apprising him of his danger, if the act be involuntary, or endeavoring to prevent it if it be voluntary. He shall be presumed to have permitted it voluntarily who omits the necessary means of preventing the death, when he knows the danger, and can cause it to be avoided, without danger of personal injury or pecuniary loss. This rule may be illustrated by the examples put in the last preceding article: if the blind man is seen walking to the precipice by one who knows the danger, can easily apprise him of it, but does not; or if one who knows that a glass contains poison, sees him about to drink it, either by mistake or with intent to destroy himself, and makes no attempt to prevent him: in these cases the omission amounts to homicide. — *Code of Crimes and Punishments*, drafted by Edward Livingston for the State of Louisiana [but not enacted by the legislature]. Volume ii, Complete Works of Edward Livingston on Criminal Jurisprudence, pp. 126, 127.

MACAULAY'S NOTES TO DRAFT OF INDIAN PENAL CODE.

Penal Code Prepared by the Indian Law Commissioners.[1] Chapter xviii [page 76]. Of Offences Affecting the Human Body. Of Offences Affecting Life.

294. Whoever does any act or omits what he is legally bound to

[1] *A Penal Code prepared by the Indian Law Commissioners*, and published by command of the Governor-General of India in Council; Calcutta, 1837. — Ed.

do, with the intention of thereby causing, or with the knowledge that he is likely thereby to cause, the death of any person, and does by such act or omission cause the death of any person, is said to commit the offence of "voluntary culpable homicide."

NOTE M.[1]

On Offences Against the Body.

The first class of offences against the body consists of those offences which affect human life; and highest in this first class stand those offences which fall under the definition of voluntary culpable homicide.

This important part of the law appears to us to require fuller explanation than almost any other.

The first point to which we wish to call the attention of his Lordship in Council is the expression "omits what he is legally bound to do," in the definition of voluntary culpable homicide. These words, or other words tantamount in effect, frequently recur in the Code. We think this the most convenient place for explaining the reason which has led us so often to employ them. For if that reason shall appear to be sufficient in cases in which human life is concerned, it will *a fortiori* be sufficient in other cases.

Early in the progress of the Code it became necessary for us to consider the following question: When acts are made punishable on the ground that those acts produce, or are intended to produce, or are known to be likely to produce certain evil effects, to what extent ought omissions which produce, which are intended to produce, or which are known to be likely to produce the same evil effects to be made punishable?

Two things we take to be evident: first, that some of these omissions ought to be punished in exactly the same manner in which acts are punished; secondly, that all these omissions ought not to be punished. It will hardly be disputed that a jailer who voluntarily causes the death of a prisoner by omitting to supply that prisoner with food, or a nurse who voluntarily causes the death of an infant intrusted to her care by omitting to take it out of a tub of water into which it has fallen, ought to be treated as guilty of murder. On the other hand, it will hardly be maintained that a man should be punished as a murderer because he omitted to relieve a beggar, even though there might be the clearest proof that the death of the beggar was the result of the omission, and that the man who omitted to give the alms knew

[1] The notes to the Draft of the Indian Penal Code, together with the Introductory Report, are reprinted in vol. vii of the Works of Lord Macaulay, English edition of 1875; edited by his sister, Lady Trevelyan. In the Preface to that edition it is said: "These papers were entirely written by Lord Macaulay, but the substance of them was the result of the joint deliberations of the Indian Law Commission, of which he was President."

The Draft of the Penal Code (submitted in 1837), after being revised, was enacted in 1860; and the Code has proved very satisfactory in its operation. For a description of its characteristics, see vol. iii of Sir J. F. Stephen's *History of the Criminal Law of England*, 298–323. — Ed.

that the death of the beggar was likely to be the effect of the omission. It will hardly be maintained that a surgeon ought to be treated as a murderer for refusing to go from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that if it were not performed the person who required it would die. It is difficult to say whether a Penal Code which should put no omissions on the same footing with acts, or a Penal Code which should put all omissions on the same footing with acts would produce consequences more absurd and revolting. There is no country in which either of these principles is adopted. Indeed, it is hard to conceive how, if either were adopted, society could be held together.

It is plain, therefore, that a middle course must be taken. But it is not easy to determine what that middle course ought to be. The absurdity of the two extremes is obvious. But there are innumerable intermediate points; and wherever the line of demarcation may be drawn it will, we fear, include some cases which we might wish to exempt, and will exempt some which we might wish to include.

Mr. Livingston's Code provides that a person shall be considered as guilty of homicide who omits to save life, which he could save "without personal danger or pecuniary loss." This rule appears to us to be open to serious objection. There may be extreme inconvenience without the smallest personal danger, or the smallest risk of pecuniary loss; as in the case which we lately put of a surgeon summoned from Calcutta to Meerut to perform an operation. He may be offered such a fee that he would be a gainer by going. He may have no ground to apprehend that he should run any greater personal risk by journeying to the Upper Provinces than by continuing to reside in Bengal. But he is about to proceed to Europe immediately, or he expects some members of his family by the next ship, and wishes to be at the presidency to receive them. He, therefore, refuses to go. Surely, he ought not, for so refusing, to be treated as a murderer. It would be somewhat inconsistent to punish one man for not staying three months in India to save the life of another, and to leave wholly unpunished a man who, enjoying ample wealth, should refuse to disburse an anna to save the life of another. Again, it appears to us that it may be fit to punish a person as a murderer for causing death by omitting an act which cannot be performed without personal danger or pecuniary loss. A parent may be unable to procure food for an infant without money. Yet the parent, if he has the means, is bound to furnish the infant with food, and if by omitting to do so he voluntarily causes its death, he may with propriety be treated as a murderer. A nurse hired to attend a person suffering from an infectious disease cannot perform her duty without running some risk of infection. Yet if she deserts the sick person, and thus voluntarily causes his death, we should be disposed to treat her as a murderer.

We pronounce with confidence, therefore, that the line ought not to

be drawn where Mr. Livingston has drawn it. But it is with great diffidence that we bring forward our own proposition. It is open to objections: cases may be put in which it will operate too severely, and cases in which it will operate too leniently; but we are unable to devise a better.

What we propose is this, that where acts are made punishable on the ground that they have caused, or have been intended to cause, or have been known to be likely to cause a certain evil effect, omissions which have caused, which have been intended to cause, or which have been known to be likely to cause the same effect shall be punishable in the same manner; provided that such omissions were, on other grounds, illegal. An omission is illegal (see clause 28) if it be an offence, if it be a breach of some direction of law, or if it be such a wrong as would be a good ground for a civil action.

We cannot defend this rule better than by giving a few illustrations of the way in which it will operate. A omits to give Z food, and by that omission voluntarily causes Z's death. Is this murder? Under our rule it is murder if A was Z's jailer, directed by the law to furnish Z with food. It is murder if Z was the infant child of A, and had therefore a legal right to sustenance, which right a civil court would enforce against A. It is murder if Z was a bedridden invalid, and A a nurse hired to feed Z. It is murder if A was detaining Z in unlawful confinement, and had thus contracted (see clause 338) a legal obligation to furnish Z, during the continuance of the confinement, with necessaries. It is not murder if Z is a beggar who has no other claim on A than that of humanity.

A omits to tell Z that a river is swollen so high that Z cannot safely attempt to ford it, and by this omission voluntarily causes Z's death. This is murder if A is a peon stationed by authority to warn travellers from attempting to ford the river. It is murder if A is a guide who had contracted to conduct Z. It is not murder if A is a person on whom Z has no other claim than that of humanity.

A savage dog fastens on Z; A omits to call off the dog, knowing that if the dog be not called off it is likely that Z will be killed. Z is killed. This is murder in A, if the dog belonged to A, inasmuch as his omission to take proper order with the dog is illegal (clause 273). But if A be a mere passer-by it is not murder.

We are sensible that in some of the cases which we have put, our rule may appear too lenient. But we do not think that it can be made more severe, without disturbing the whole order of society. It is true that the man who, having abundance of wealth, suffers a fellow creature to die of hunger at his feet, is a bad man, — a worse man, probably, than many of those for whom we have provided very severe punishment. But we are unable to see where, if we make such a man legally punishable, we can draw the line. If the rich man who refuses to save a beggar's life at the cost of a little copper is a murderer, is the poor man just one degree above beggary also to be a murderer if

he omits to invite the beggar to partake his hard-earned rice? Again, if the rich man is a murderer for refusing to save the beggar's life at the cost of a little copper, is he also to be a murderer if he refuses to save the beggar's life at the cost of a thousand rupees? Suppose A to be fully convinced that nothing can save Z's life, unless Z leave Bengal and reside a year at the Cape, is A, however wealthy he may be, to be punished as a murderer because he will not, at his own expense, send Z to the Cape? Surely not. Yet it will be difficult to say on what principle we can punish A for not spending an anna to save Z's life, and leave him unpunished for not spending a thousand rupees to save Z's life. The distinction between a legal and an illegal omission is perfectly plain and intelligible. But the distinction between a large and a small sum of money is very far from being so; not to say that a sum which is small to one man is large to another.

The same argument holds good in the case of the ford. It is true that none but a very depraved man would suffer another to be drowned when he might prevent it by a word. But if we punish such a man, where are we to stop? How much exertion are we to require? Is a person to be a murderer if he does not go fifty yards through the sun of Bengal at noon in May in order to caution a traveller against a swollen river? Is he to be a murderer if he does not go a hundred yards? — if he does not go a mile? — if he does not go ten? What is the precise amount of trouble and inconvenience which he is to endure? The distinction between the guide who is bound to conduct the traveller as safely as he can, and a mere stranger, is a clear distinction. But the distinction between a stranger who will not give a halloo to save a man's life, and a stranger who will not run a mile to save a man's life, is very far from being equally clear.

It is, indeed, most highly desirable that men should not merely abstain from doing harm to their neighbours, but should render active services to their neighbours. In general, however, the penal law must content itself with keeping men from doing positive harm, and must leave to public opinion, and to the teachers of morality and religion, the office of furnishing men with motives for doing positive good. It is evident that to attempt to punish men by law for not rendering to others all the service which it is their duty to render to others would be preposterous. We must grant impunity to the vast majority of those omissions which a benevolent morality would pronounce reprehensible, and must content ourselves with punishing such omissions only when they are distinguished from the rest by some circumstance which marks them out as peculiarly fit objects of penal legislation. Now, no circumstance appears to us so well fitted to be the mark as the circumstance which we have selected. It will generally be found in the most atrocious cases of omission; it will scarcely ever be found in a venial case of omission; and it is more clear and certain than any other mark that has occurred to us. That there are objections to

the line which we propose to draw, we have admitted. But there are objections to every line which can be drawn, and some line must be drawn.[1]

SECTION V.

Duty of Care owing from Defendant to Plaintiff.

BLYTH *v.* TOPHAM.

5 *James First. Croke's Reports in Reign of James First,* 158.

ACTION ON THE CASE; for that he [Topham] digged a pit in such a common, by occasion whereof his [Blyth's] mare, being straying there, fell into the said pit and perished.

The plaintiff, to save costs, now moved in arrest of judgment upon the verdict, that the declaration was not good; for when the mare was straying, and he shews not any right why his mare should be in the said common, the digging of the pit is lawful as against him: and although his mare fell therein, he hath not any remedy; for it is *damnum absque injuria;* wherefore an action lies not by him. THE WHOLE COURT was of that opinion. It was therefore adjudged upon the *declaration* that the bill should abate, and not upon the verdict.[a]

[a] *Sed vide* Moor, 625; Hobart, 219; *Cro. Car.* 175; Sayer's Costs, 77, 78.

LANE *v.* COX.

1896. *Law Reports* (1897), 1 *Queen's Bench,* 415.[2]

APPEAL from a judgment of nonsuit.

The defendant was owner of a house which he let unfurnished to a weekly tenant. There were no covenants to repair on the part of either the landlord or the tenant. The plaintiff was a workman, who came upon the premises at the request of the tenant for the purpose of moving some furniture. While so employed the plaintiff was injured owing to the defective state of the staircase in the house. There was evidence that at the time the house was let the staircase was in an un-

[1] Notes to Draft of Penal Code, pp. 53–56; Vol. vii, Macaulay's Complete Works, English edition of 1875, pp. 493–497; Morgan and Macpherson's edition of *Indian Penal Code,* pp. 225, 226, notes. — ED.

[2] Arguments omitted. — ED.

safe condition. The plaintiff brought this action to recover damages for the injuries he had sustained, and it was tried before the Lord Chief Justice, who entered a nonsuit.

The plaintiff appealed.

E. W. Sinclair Cox (with him *F. Lampard*), for plaintiff.

B. F. Williams, Q. C. (with him *F. R. Y. Radcliffe*), for defendant.

Cur. adv. vult.

LORD ESHER, M. R. [After stating the case.] There was no contractual relation between the plaintiff and the defendant, and it was not like the case of a person who keeps a shop to which he intends people to come. It is said, however, that the defendant was guilty of negligence which led to the accident because he let the house in a defective condition. It has been often pointed out that a person cannot be held liable for negligence unless he owed some duty to the plaintiff and that duty was neglected. There are many circumstances that give rise to such a duty, as, for instance, in the case of two persons using a highway, where proximity imposes a duty on each to take reasonable care not to interfere with the other. So if a person has a house near a highway, a duty is imposed on him towards persons using the highway; and similarly there is a duty to an adjoining owner or occupier; and, if by the negligent management of his house he causes injury, in either of these cases he is liable. In this case the negligence alleged is the letting the house in an unsafe condition. It has been held that there is no duty imposed on a landlord, by his relation to his tenant, not to let an unfurnished house in a dilapidated condition, because the condition of the house is the subject of contract between them. If there is no duty in such a case to the tenant, there cannot be a duty to a stranger. There was, therefore, no duty on the part of the defendant to the plaintiff, and there could be no liability for negligence, and the nonsuit was right.

LOPES, L. J. . . . But then it is said that the claim of the plaintiff may be grounded on the negligence of the defendant. There cannot be a liability for negligence unless there is a breach of some duty; and no duty exists in this case to the tenant, and none can be alleged to strangers. The case differs entirely from those in which property is in a dangerous state by reason of which an injury happens to one of the public on a highway, or to the occupier of an adjoining house. I think the appeal should be dismissed.

RIGBY, L. J., concurred.

Appeal dismissed.

BRETT, M. R., IN HEAVEN *v.* PENDER.

1883. *Law Reports*, 11 *Queen's Bench Division*, 503, pp. 506, 507.

BRETT, M. R. . . . The action is in form and substance an action for negligence. That the stage was, through want of attention of the defendant's servants, supplied in a state unsafe for use is not denied. But want of attention amounting to a want of ordinary care is not a good cause of action, although injury ensue from such want, unless the person charged with such want of ordinary care had a duty to the person complaining to use ordinary care in respect of the matter called in question. (Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property.) The question in this case is whether the defendant owed such a duty to the plaintiff.

MITCHELL, J., IN AKERS *v.* CHICAGO, &c., R. R. CO.

1894. 58 *Minnesota*, 540, p. 544.

MITCHELL, J. Actionable negligence is the failure to discharge a legal duty to the person injured. If there is no duty, there is no negligence. Even if a defendant owes a duty to some one else, but does not owe it to the person injured, no action will lie. The duty must be due to the person injured. These principles are elementary, and are equally applicable, whether the duty is imposed by positive statute or is founded on general common-law principles.[1]

[Two classes of cases which have recently occupied much space in the reports may be briefly alluded to here. — ED.]

Class 1. As to whether the negligence of the manufacturer of a chattel may make him liable to persons (future users) other than those contracting with him (his immediate vendees).

B manufactures a chattel and sells it to C, a retail dealer. C resells it to D, a customer who purchases for use. Owing to the negligence of B in manufacturing, the chattel contains a defect not easily discoverable in the completed article. The existence of this defect is unknown to B, C, and D; but it would have been known to B if he had used reasonable care in manufacturing. D, while carefully using the chattel, suffers harm from this defect.

[1] "The duty must be one owed by the defendants to the plaintiffs in respect to the very matter or act charged as negligence." — PARSONS, C. J., in *Pittsfield C. M. Co.* v. *Pittsfield Shoe Co.*, 71 New Hampshire, 522, p. 531.

Does B owe a duty of care, not only to the first vendee, but also to sub-vendees?

Can D maintain an action for negligence against B?

The weight of judicial authority returns a negative answer to both questions. See Pollock, *Torts*, 6th ed., 496, 497; Pigott, *Torts*, 231, 232; 1 Jaggard on Torts, 904–909, Salmond, *Torts*, 363.

A distinction has, however, been laid down which takes a large class of cases out of the operation of the alleged general rule. That distinction is, that, when the negligent defect in the chattel would render its use imminently dangerous to human life, then the manufacturer's negligence makes him liable to a sub-vendee or remote user who suffers damage. A leading case to this effect is *Thomas* v. *Winchester*, 6 New York, 397.

But if the result in *Thomas* v. *Winchester* is correct (as we believe it to be), ought not the doctrine to be carried further and the alleged general rule be utterly repudiated? ". . . why liability should, as towards strangers to the contract, be limited to cases in which the negligent act is likely to cause death, and not be extended to cases in which it is likely to cause injury of other kinds, it is difficult to see. The fact that one kind of article is likely to produce damage of a less degree than another is a good reason for requiring a less degree of care to be taken, but seems to afford no reason for limiting the class of persons towards whom the duty to take that care is owed." Clerk & Lindsell on Torts, 2d ed., 404, 405.

The intrinsic correctness of the general doctrine as to the non-liability of the manufacturer seems to be doubted by Salmond (363); is denied by Clerk & Lindsell (2d ed., 403–406); and is elaborately controverted by Professor Bohlen in his able discussion in 44 *American Law Register*, N. S., 280–284; 289–310 · 337–377.

It will be noticed that the question is not whether the manufacturer should be made an insurer; nor whether a sub-vendee can avail himself of a warranty given by the manufacturer to the first vendee. It is whether the manufacturer is under a duty to any one, save the first vendee, to use reasonable care in manufacturing.

Class 2. An Aqueduct Company contracts with a city to keep sufficient water, with sufficient pressure, in pipes and hydrants to extinguish fires. The Company fails to keep the pipes supplied with water. The house of a citizen burns when it could have been saved if water had been supplied in the pipes.

Can the citizen maintain an action of tort against the Aqueduct Company to recover the value of his house?

The great weight of authority is in the negative.

For conflicting cases and a presentation of both sides, see 19 *Green Bag*, 129–133. — Ed.

SECTION VI.

Breach of Duty.

["As a matter of course, there can be no negligence where there is no breach of duty. It must appear, therefore, not only that the defendant owed a duty, but also that he did not perform it." 1 Shearman & Redfield on Negligence, 4th ed., sect. 15.

There is a controversy as to whether breaches of duty under certain circumstances should be regarded as negligent torts or as intentional torts. To constitute a negligent tort, as distinguished from an intentional tort, is it necessary that the defendant's breach, or omission, of the duty to use care should be inad-

vertent? If the defendant was conscious of his duty to use care and conscious that he was omitting to perform that duty, can his conduct be termed a negligent, rather than an intentional tort? Assuming that the damage which resulted was not desired by him, does his consciousness of breach of duty make him an intentional tort feasor?

This question is discussed in some of the cases to be found in section 3 of chapter vii, *post*.

The conflicting views are brought out in the following extracts from text-writers. — Ed.]

Negligence, in its civil relations, is such an inadvertent imperfection, by a responsible human agent, in the discharge of a legal duty, as immediately produces, in an ordinary and natural sequence, a damage to another. The *inadvertency*, or want of due consideration of duty, is the *injuria*, on which, when naturally followed by the *damnum*, the suit is based. — Wharton on Negligence, 1st ed., sect. 3.

Dr. Wharton defines negligence as always implying inadvertence in the act complained of. But this is not necessary. The inadvertence, which marks the distinction between negligence and wilful injuries, relates to the damage, rather than to the act which causes the damage. Thus, a railroad engineer may wilfully shut his eyes and go to sleep. If, while thus asleep, he runs over a man, the test which would determine whether his act was merely gross negligence or was a wilful injury would be to ascertain whether, when he closed his eyes, he saw the man upon the track or knew that he would be there, or not. If he knew that he would inflict the injury, or if he intended to do it, his act would cease to be mere negligence, but not otherwise. Doubtless, it would be a fair question for the jury; but it could not be ruled upon as a point of law. — 1 Shearman & Redfield on Negligence, 4th ed., sect. 6.

[After quoting Dr. Wharton's definition of negligence.] Now inadvertence in its ordinary meaning is closely allied, if not synonymous, with heedlessness;[1] whereas the scope of negligence is much wider, and extends to neglects of which the consequences are clearly foreseen, though not willed; as the allowing a drain-pipe to be stopped and thereby causing a flood; where the injurious consequence has clearly been foreseen, though, through *inertia* of the person whose duty it was to clear it, no precaution is taken. This is neither an inadvertent act, since the consequences are foreseen, nor yet a wilful one, since they are not willed; the negligent person trusts to the chapter of accidents or to the act of some third person to save him from the consequences of his sluggishness.

Scientifically, "inadvertence" may be a necessary element in negligence; legally, it is not so. Negligence as a juristic word in practice

[1] "In cases of heedlessness, he adverts not to *consequences* of the act he does." 1 Beven on Negligence, 3d ed., 4; stating Austin's distinctions. — Ed.

connotes only default in duty. How the default arises is immaterial. 1 Beven on Negligence, 3d ed., 5.

Negligence is usually accompanied by inadvertence, but it is not the same thing, and this coincidence is not invariable. Carelessness as to possible consequences very often results in a failure to bring those consequences to mind, *i. e.*, inadvertence. Commonly, therefore, the careless person not only does not intend the consequence, but does not even advert to it; its possibility or probability does not occur to his mind. But this is not always so, for there is such a thing as wilful, *i. e.*, conscious and advertent negligence. The wrongdoer may not desire or intend the consequence, but may yet be perfectly conscious of the risk of it. He does not intentionally cause the harm, but he intentionally and consciously exposes others to the risk of it. He who throws a stone over a wall into the street, and so hurts a passenger, may have been perfectly conscious of the danger which he was thus causing, and yet so careless of others' rights and interests, that he was content to risk the happening of an accident. But whether he did or did not advert to the danger, he was guilty merely of negligence, and not of wilful harm. There is no wilful harm, unless he not merely adverted to the possible consequence, but did the act in order that that consequence should happen. — Salmond on Torts, 19.

To have an action there must be SECTION VII.

Actual Damage to Plaintiff.

SULLIVAN *v.* OLD COLONY STREET RAILWAY.

1908. 200 *Massachusetts*, 303.[1]

Tort. The first count in the declaration alleged that, while the plaintiff was a passenger on an electric car of the defendant, the car was derailed at Tiverton, owing to the defendant's negligence, "whereby the plaintiff was jolted and in many ways injured externally and internally."

At the trial, plaintiff testified substantially to the same effect as the allegations in the declaration. As to the derailment, he testified that it was violent and that he was much thrown about. The evidence for the defendant tended to show that there was practically no jar when the car left the rails at Tiverton.

[1] Only so much of the report is given as relates to the first count. — Ed.

At the close of the evidence plaintiff requested, among others, the following ruling: —

"1. Upon all the evidence the plaintiff is entitled to recover on the first count."

The judge refused to so rule.

The judge instructed the jury, in part, as follows: —

"The only matters, then, of damages for you to consider are these: First, what was the effect upon the plaintiff of the jolts when the car was derailed? To what extent did they injure the plaintiff?"

Plaintiff excepted to the charge. Verdict for defendant.

D. M. Radovsky, for plaintiff.

J. M. Swift, for defendant.

SHELDON, J. No question was made at the trial but that the defendant was liable for any injury done to the plaintiff by reason of its car having left the track. But if no injury was caused by this to the plaintiff, if he suffered no damage whatever from the defendant's negligence, then he would not be entitled to recover. Although there has been negligence in the performance of a legal duty, yet it is only those who have suffered damage therefrom that may maintain an action therefor. *Heaven* v. *Pender*, 11 Qu. B. D. 503, 507; *Farrell* v. *Waterbury Horse Railroad*, 60 Conn. 239, 246; *Salmon* v. *Delaware, Lackawanna & Western Railroad*, 19 Vroom, 5, 11. 2 Cooley on Torts (3d ed.), 791; Wharton on Negligence (2d ed.), sect. 3. In cases of negligence, there is no such invasion of rights as to entitle plaintiff to recover at least nominal damages, as in *Hooten* v. *Barnard*, 137 Mass. 36, and *McAneany* v. *Jewett*, 10 Allen, 151. Accordingly, the first and second of the plaintiff's requests for rulings could not have been given, and the rulings made were all that the plaintiff was entitled to.

[Remainder of opinion omitted.]

Exceptions overruled.

BOWEN, L. J., IN BRUNSDEN v. HUMPHREY.

1884. *Law Reports*, 14 *Queen's Bench Division*, 141, 149-151.

[PLAINTIFF previously brought an action for damage to his cab occasioned by the negligent driving of defendant's servant. Defendant paid into court a sum of money which was accepted, and thereupon the action was discontinued.

Plaintiff thereafter brought the present action, claiming damages for harm to his person occasioned by the same negligent driving of the defendant.

BRETT, M. R., and BOWEN, L. J., held that the present action was maintainable, and was not barred by the previous proceeding. LORD COLERIDGE, C. J., dissented.

Portions of the opinion of BOWEN, L. J., were as follows: —]

BOWEN, L. J. . . . In the present instance, as the defendant himself was not driving but his servant, trespass would not have lain under the old law, and the plaintiff's remedy would have been in an action on the case for negligence, based on the negligent management by the servant of his master's horses, a negligence for which in the eye of the law the master or employer is responsible. Now what is the gist of such an action on the case for negligence? If the whole of the plaintiff's case were to be stated and the entire story told, it seems to me that it would have comprised two separate or distinct grievances, narrated, it is true, in one statement or case. Actions for the negligent management of any animal, or any personal or moveable chattel, such as a ship or machine, or instrument, all are based upon the same principle, viz., that a person, who, contrary to his duty, conducts himself negligently in the management of that which contains in itself an element of danger to others, is liable for all injury caused by his want of care or skill. Such an action is based upon the union of the negligence and the injuries caused thereby, which in such an instance will as a rule involve and have been accompanied by specific damage. Without remounting to the Roman law, or discussing the refinements of scholastic jurisprudence and the various uses that have been made, either by judges or juridical writers, of the terms "injuria" and "damnum," it is sufficient to say that the gist of an action for negligence seems to me to be the harm to person or property negligently perpetrated. In a certain class of cases the mere violation of a legal right imports a damage. "Actual perceptible damage," says Parke, B., in *Embrey* v. *Owen* (1), "is not indispensable, as the foundation of an action; it is sufficient to shew the violation of a right, in which case the law will presume damage." But this principle is not as a rule applicable to actions for negligence: which are not brought to establish a bare right, but to recover compensation for substantial injury. "Generally speaking," says Littledale, J., in *Williams* v. *Morland* (2), "there must be temporal loss or damage accruing from the wrongful act of another in order to entitle a party to maintain an action on the case"; see *Fay* v. *Prentice* (3), per Maule, J.

This leads me to consider whether, in the case of an accident caused by negligent driving, in which both the goods and the person of the plaintiff are injured, there is one cause of action only or two causes of action which are severable and distinct. This is a very difficult question to answer, and I feel great doubt and hesitation in differing from the judgment of the Court below and from the great authority of the present Chief Justice of England. According to the popular use of language, the defendant's servant has done one act and one only, the driving of the one vehicle negligently against the other. But the rule of law, which I am discussing, is not framed with refer-

(1) 6 Ex. 353, at 368. (2) 2 B. & C. 916. (3) 1 C. B. 835.

ence to some popular expressions of the sort, but for the sake of preventing an abuse of substantial justice. Two separate kinds of injury were in fact inflicted, and two wrongs done. The mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the damage which it caused. One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person. Both causes of action, in *one* sense, may be said to be founded upon one act of the defendant's servant, but they are not on that account identical causes of action. The wrong consists in the damage done without lawful excuse, not the act of driving, which (if no damage had ensued) would have been legally unimportant.

. . . . . .

SECTION VIII.

Damage Caused, in Legal Sense, by Defendant's Breach of Duty.

HART *v.* ALLEN.

1833. 2 *Watts (Pennsylvania)*, 114.[1]

ACTION on the case against owners of a vessel. Plaintiff put in evidence a bill of lading of chests of tea shipped on board defendant's vessel; "to be delivered in good order, unavoidable accidents and the dangers of the river excepted. . . ." Plaintiff also proved that the teas were delivered by defendants in a damaged state, owing to their having been wet. Defendants gave evidence that the boat, when on her passage up the river, was driven by a sudden squall of wind and snow sidewise, whereby the teas were wet and damaged; that she was well fitted for the voyage; that every exertion was made to save her; and that Samuel Johnston, the captain, was a man of experience. To rebut this the plaintiff gave evidence that Samuel Johnston was not an experienced boatman or pilot.

Judgment below for plaintiff. The original defendants brought error. One of the errors assigned was as follows: —

The court below erred in charging the jury, that although the accident in this case resulted from the act of God, and could not have been prevented by any human prudence or foresight; and although it would, in this respect, come within the exception that excuses the

[1] Statement condensed. Only part of opinion is given. — ED.

carrier in case of loss: still, if the crew of the boat was not sufficient, or if she was not under the control of a master or pilot sufficiently skilled to perform the duties corresponding to his station, the carrier cannot avail himself of the exception, nor excuse himself from responsibility to the owner, to the extent of the injury done to the goods. And also, in substance, that if the jury think that the boat was not fit for the voyage, or the master not competent, or the crew insufficient; they ought to find a verdict for the plaintiff, whatever might be their opinion as to the real cause of the upsetting of the boat.

Fetterman, for plaintiff in error.

Craft and *Forward, contra.*

GIBSON, C. J. Had the judge said no more than that the carrier is bound to provide a carriage or vessel in all respects adequate to the purpose, with a conductor or crew of competent skill or ability, and that "failing in these particulars, though the loss be occasioned by the act of God, he shall not set up a providential calamity to protect himself against what *may* have arisen from his own folly"; there would have been no room for an exception. But the cause was eventually put to the jury on a different principle: ("though the accident resulted from the act of God," it was said, "*and could not have been prevented by any human prudence or foresight*, and though it would in this respect otherwise have come within the exception that excuses the carrier in case of loss: still, if the crew of the office [?] were not sufficient, or if she were not under the control of a master or pilot sufficiently skilful to perform the duties correspondent to his station, the carrier cannot avail himself of the exception." By this the jury were instructed, in accordance, as it was supposed, with the principle of *Bell* v. *Reed and Beelor*, 4 Binn. 127, that want of seaworthiness has the peculiar effect of casting every loss, from whatever cause, on the carrier, as a penalty, I presume, for his original delinquency, and not for its actual or supposed instrumentality in contributing to the disaster, which is admitted to have been produced, in this instance, by causes unconnected with the master or crew, and to have been of a nature which no human force or sagacity could control.

Does such a penalty necessarily result from the nature of the contract? A carrier is answerable for the consequences of negligence, not the abstract existence of it. Where the goods have arrived safe, no action lies against him for an intervening but inconsequential act of carelessness: nor can it be set up as a defence against payment of the freight; and for this plain reason, that the risk from it was all his own. Why, then, should it, in any other case, subject him to a loss which it did not contribute to produce, or give an advantage to one who was not prejudiced by it? It would require much to reconcile to any principle of policy or justice, a measure of responsibility which would cast the burthen of the loss on a carrier whose wagon had been snatched away by a whirlwind in crossing a bridge, merely because it had not been furnished with a proper cover or tilt to protect the goods

from the weather. Yet the omission to provide such a cover would be gross negligence, but, like that imputed to the carrier in the case before us, such as could have had no imaginable effect on the event. A carrier is an insurer against all losses without regard to degrees of negligence in the production of them, except such as have been caused by an act of providence, or the common enemy: and why is he so? Undoubtedly to subserve the purposes, not of justice in the particular instance, but of policy and convenience: of policy, by removing from him all temptation to confederate with robbers or thieves — and of convenience, by relieving the owner of the goods from the necessity of proving actual negligence, which, the fact being peculiarly within the knowledge of the carrier or his servants, could seldom be done. *Jones on Bail*, 108, 109; 2 Kent, 59, 78. Such are the rule and the reason of it, and such is the exception. But we should enlarge the rule, or to speak more properly, narrow the exception far beyond the exigencies of policy or convenience, did we hold him an insurer against even the acts of providence, as a punishment for an abstract delinquency, where there was no room for the existence of a confederacy, or the operation of actual negligence; and to carry a responsibility, founded in no principle of natural equity beyond the requirements of necessity, would be gratuitous injustice. A delinquency which might have contributed to the disaster, such, for instance, as is imputable to the owner of a ship driven on a lee shore, for a defect in the rigging or sails, would undoubtedly be attended with different consequences; for as it would be impossible to ascertain the exact effect of the delinquency on the event, the loss would have to be borne by the delinquent on a very common principle, by which any one whose carelessness has increased the danger of injury from a sudden commotion of the elements, is chargeable with all the mischief that may ensue: as in *Turberville* v. *Stamp*, Skin. 681, where it was adjudged, that the negligent keeping of fire in a close would subject the party to all the consequences, though proximately produced by a sudden storm; and the same principle was held by this court in *The Lehigh Bridge Company* v. *The Lehigh Navigation*, 4 Rawle, 9. But it would be too much to require of the carrier to make good a loss from shipwreck, for having omitted to provide the ship with proper papers, which are a constituent part of seaworthiness, and the omission of them an undoubted negligence.

. . . . . .

The first question, therefore, will be, whether the captain and crew of the boat had the degree of ability and skill thus indicated; and if it be found that they had not, then the second question will be, whether the want of it contributed in any degree to the actual disaster: but if either of these be found for the carrier, it will be decision [decisive?] of the cause. It seems, therefore, that . . . the cause ought to be put, on these principles, to another jury.

Judgment reversed, and a venire de novo awarded.

CHAPTER V.

STANDARD OF CARE. WHETHER DEGREES OF CARE.

VAUGHAN *v.* MENLOVE.

1837. 3 *Bingham's New Cases*, 468.[1]

THE declaration alleged, in substance, that plaintiff was the owner of two cottages; that defendant owned land near to the said cottages; that defendant had a rick or stack of hay near the boundary of his land which was liable and likely to ignite, and thereby was dangerous to the plaintiff's cottages; that the defendant, well knowing the premises, wrongfully and negligently kept and continued the rick in the aforesaid dangerous condition; that the rick did ignite, and that plaintiff's cottages were burned by fire communicated from the rick or from certain buildings of defendant's which were set on fire by flames from the rick.

Defendant pleaded the general issue; and also several special pleas, denying negligence.

At the trial it appeared that the rick in question had been made by the defendant near the boundary of his own premises; that the hay was in such a state when put together, as to give rise to discussions on the probability of fire; that though there were conflicting opinions on the subject, yet during a period of five weeks the defendant was repeatedly warned of his peril; that his stock was insured; and that upon one occasion, being advised to take the rick down to avoid all danger, he said "he would chance it." He made an aperture or chimney through the rick; but in spite, or perhaps in consequence of this precaution, the rick at length burst into flames from the spontaneous heating of its materials; the flames communicated to the defendant's barn and stables, and thence to the plaintiff's cottages, which were entirely destroyed.

Patterson, J., before whom the cause was tried, told the jury that the question for them to consider was, whether the fire had been occasioned by gross negligence on the part of the defendant; adding, that he was bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances.

A verdict having been found for the plaintiff, a rule nisi for a new trial was obtained, on the ground that the jury should have been directed to consider, not whether the defendant had been guilty of a gross negligence with reference to the standard of ordinary prudence, a standard too uncertain to afford any criterion, but whether he had acted *bonâ fide* to the best of his judgment; if he had, he ought not to be responsible for the misfortune of not possessing the highest order of intelligence. The action under such circumstances was of the first impression.

[1] Statement abridged. — ED.

Talfourd, Serjt., and *Whately*, showed cause.

The pleas having expressly raised issues on the negligence of the defendant, the learned judge could not do otherwise than leave that question to the jury. The declaration alleges that the defendant knew of the dangerous state of the rick, and yet negligently and improperly allowed it to stand. The plea of not guilty, therefore, puts in issue the scienter, it being of the substance of the issue: *Thomas* v. *Morgan*, 2 Cr. M. & R. 496. And the action, though new *in specie*, is founded on a principle fully established, that a man must so use his own property as not to injure that of others. On the same circuit a defendant was sued a few years ago for burning weeds so near the extremity of his own land as to set fire to and destroy his neighbors' wood. The plaintiff recovered damages, and no motion was made to set aside the verdict. Then, there were no means of estimating the defendant's negligence, except by taking as a standard the conduct of a man of ordinary prudence: that has been the rule always laid down, and there is no other that would not be open to much greater uncertainties.

R. V. Richards, in support of the rule.

First, there was no duty imposed on the defendant, as there is on carriers or other bailees, under an implied contract, to be responsible for the exercise of any given degree of prudence: the defendant had a right to place his stack as near to the extremity of his own land as he pleased, *Wyatt* v. *Harrison*, 3 B. & Adol. 871: under that right, and subject to no contract, he can only be called on to act *bonâ fide* to the best of his judgment; if he has done that, it is a contradiction in terms, to inquire whether or not he has been guilty of gross negligence. At all events what would have been gross negligence ought to be estimated by the faculties of the individual, and not by those of other men. The measure of prudence varies so with the varying faculties of men, that it is impossible to say what is gross negligence with reference to the standard of what is called ordinary prudence. In *Crook* v. *Jadis*, 5 B. & Adol. 910, Patterson, J., says, "I never could understand what is meant by parties taking a bill under circumstances which ought to have excited the suspicion of a prudent man:" and Taunton, J., "I cannot estimate the degree of care which a prudent man should take."

[Remainder of argument omitted.]

TINDAL, C. J. I agree that this is a case *primæ impressionis*; but I feel no difficulty in applying to it the principles of law as laid down in other cases of a similar kind. Undoubtedly this is not a case of contract, such as a bailment or the like, where the bailee is responsible in consequence of the remuneration he is to receive: but there is a rule of law which says you must so enjoy your own property as not to injure that of another; and according to that rule the defendant is liable for the consequence of his own neglect: and though the defendant did not himself light the fire, yet mediately he is as much the cause of it as if he had himself put a candle to the rick; for it is well known that hay will ferment and take fire if it be not carefully stacked. It has been

decided that if an occupier burns weeds so near the boundary of his own land that damage ensues to the property of his neighbor, he is liable to an action for the amount of injury done, unless the accident were occasioned by a sudden blast which he could not foresee. *Turbervill* v. *Stamp*, 1 Salk. 13. But put the case of a chemist making experiments with ingredients, singly innocent, but when combined liable to ignite; if he leaves them together, and injury is thereby occasioned to the property of his neighbor, can any one doubt that an action on the case would lie?

It is contended, however, that the learned judge was wrong in leaving this to the jury as a case of gross negligence, and that the question of negligence was so mixed up with reference to what would be the conduct of a man of ordinary prudence that the jury might have thought the latter the rule by which they were to decide; that such a rule would be too uncertain to act upon; and that the question ought to have been whether the defendant had acted honestly and *bonâ fide* to the best of his own judgment. That, however, would leave so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various: and though it has been urged that the care which a prudent man would take, is not an intelligible proposition as a rule of law, yet such has always been the rule adopted in cases of bailment, as laid down in *Coggs* v. *Bernard*, 2 Ld. Raym. 909. Though in some cases a greater degree of care is exacted than in others, yet in "the second sort of bailment, viz., *commodatum* or lending gratis, the borrower is bound to the strictest care and diligence to keep the goods so as to restore them back again to the lender; because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect he will be answerable; as if a man should lend another a horse to go westward, or for a month; if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him; but if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be charageable, because the neglect gave the thieves the occasion to steal the horse." (The care taken by a prudent man has always been the rule laid down; and as to the supposed difficulty of applying it, a jury has always been able to say, whether, taking that rule as their guide, there has been negligence on the occasion in question.)

Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe. (That was in substance the criterion presented to the jury in this case, and therefore the present rule must be discharged.)

[Concurring opinions were delivered by PARK, and VAUGHAN, JJ. GASELEE, J. concurred in the result.] *Rule discharged.*

KNOWLTON, J., IN BRICK v. BOSWORTH.

1894. 162 *Massachusetts*, 334, p. 338.

KNOWLTON, J. . . . The presiding justice had instructed the jury at considerable length on the subject of the plaintiff's care, which was an important part of the case, and he used the words "due care" many times, but he gave the jury no standard by which to determine what "due care" was. The only explanatory phrase was the expression "proper care," which occurs once in this part of the charge. We think the plaintiff was entitled to have the jury told, on her request, that "the same care that people of ordinary prudence would exercise under the same circumstances" was all that was required of the plaintiff's husband. . . .

DODGE, J., IN YERKES v. NORTHERN PACIFIC R. R. CO.

1901. 112 *Wisconsin*, 184, pp. 193–194.

DODGE, J. . . . Plaintiff assigns as error the definition of the due care which plaintiff was bound to exercise to avert the charge of contributory negligence, viz.: —

"The plaintiff cannot recover in this case unless you find that he was in no manner guilty of any want of ordinary care, or such care as persons of ordinary care ordinarily use, which contributed to his said injuries."

That this was an incorrect and misleading definition of "ordinary care" has been declared so often by this court as to make further discussion unnecessary. The rule has been repeatedly laid down that due care is to be tested by the surrounding circumstances, and that no definition is complete or correct which does not embody that element. Ordinary care is the care ordinarily exercised by the great mass of mankind, or its type, the ordinarily prudent person, under the same or similar circumstances, and the omission of the last qualification, "under the same or similar circumstances," or "under like circumstances," is error. *Boelter* v. *Ross L. Co.*, 103 Wis. 324, 330; *Dehsoy* v. *Milwaukee E. R. & L. Co.*, 110 Wis. 412; *Warden* v. *Miller*, *ante*, p 67. The necessity of the omitted qualification to a correct definition of due care is especially obvious under the circumstances of this case. (What would be the care of an ordinarily prudent person, standing in safety upon a stationary platform, or even standing upon the perfect and level footboard of a moving switch engine, would not be the care to be expected of one attempting to perform the services of a yard man upon a bent, declining, and defective footboard such as here presented.) The attention of the jury was not called by this instruction to a very important element which they must consider in order to decide whether the plaintiff was or was not guilty of contributory negligence, and the instruction to them on the subject was therefore misleading and erroneous.

ST. LOUIS, &c., R. R. CO. *v.* FINLEY.

1890. 79 *Texas*, 85.[1]

SUIT to recover damages for negligence. The court instructed the jury, in part, as follows: —

"Negligence is the want of ordinary care. Ordinary care is that degree of care a person would use under similar circumstances."

Verdict for plaintiff. Appeal.

Todd & Hudgins, for appellant.

W. P. McLean, for appellee.

GAINES, J. . . . But we think the definition erroneous and misleading. Ordinary care is the care that a person of ordinary prudence would exercise under the same circumstances. It is not clear to us what meaning should be attached to the definition of care given by the court. The jury probably understood it to mean the care that any person, even one of the slightest circumspection, might exercise under similar circumstances, — that is to say, the slightest care. . . . From the charge the jury may have understood that if she exercised any care whatever she was not precluded of a recovery. . . .

Reversed and remanded.

AUSTIN, &c., R. R. CO. *v.* BEATTY.

1889. 73 *Texas*, 593,[2] p. 596.

BEATTY sued to recover for damages sustained by him in the service of the R. R. Co.

The court instructed the jury to find for the plaintiff if there was, on the part of defendant's superintendent, "a failure to take such care for the safety of Beatty as an ordinary man would use under like circumstances." A similar standard was applied to determine the question of Beatty's contributory negligence.

Plaintiff had a verdict and judgment. Defendant appealed.

Maxey & Fisher, for appellant.

Rector, Moore & Thomson, for appellee.

ACKER, P. J. . . . A man may be "ordinary" in stature, in personal appearance, or otherwise, and yet be utterly reckless and have no sense of prudence or caution, or he may be extraordinarily careful and prudent. Whether applied to the negligence of a defendant or the contributory negligence of a plaintiff, we believe the correct definition of the degree of care to be exercised by either in determining whose negligence occasioned the injury, is expressed in these words: Such care and caution as an ordinarily prudent person would exercise under

[1] Only so much of the case is given as relates to a single point. Argument omitted. — ED.

[2] Only part of the case is given Arguments omitted. — ED.

similar circumstances. We think the court erred in the particular indicated by the first ground of objection and in refusing to give the special charge requested.

. . . . . .

Reversed and remanded.

SNODGRASS, J., IN LOUISVILLE, &c., R. R. CO *v.* GOWER.

1887. 85 *Tennessee*, 465, pp. 473-475.

SNODGRASS, J. The charge was otherwise incorrect and misleading, particularly in defining the care necessary to have been exercised by plaintiff, Gower, in order to entitle him to recovery. The court, after telling the jury that "it was the duty of the plaintiff to exercise such a degree of care in making the coupling as a man of ordinary prudence" would have done, adds, "Just such care *as one of you*, similarly employed, would have exercised under such circumstances. If he exercised that degree of care, and was nevertheless injured, he is entitled to your verdict. If he failed to exercise that degree of care, he cannot recover."

The charge as to the exercise of such care as a man of ordinary prudence would have done was correct, but it was thought not full enough by the judge, who illustrated what he meant by reference to the care which each one of the jurymen would have exercised. His charge, so limited, was erroneous. It does not appear that all or any of the members of the jury were men of ordinary prudence, and yet the judge tells them that what he means by the "exercise of such care as a man of ordinary prudence would have exercised" is that it was the exercise of such care as one of them would have exercised if similarly situated. Under this instruction, if any member of the jury thought he would have done what Gower did in the coupling, he would of course have determined that Gower acted with the care required, and was entitled to recover. This illustration, used to define what he meant by "the care of a man of ordinary prudence," and thereby becoming its definition, was erroneous. The care he was required to exercise was that of a man of ordinary prudence in that dangerous situation, and not "just such care as one of the jury similarly situated" would have done, be that much or little, as each member might be very prudent or very imprudent.[1]

[1] Compare POWELL, J., in *Mayor of Americus* v. *Johnson*, A. D. 1907, 2 Georgia Appeals, 378, p. 381. — ED.

CLEVELAND ROLLING MILL CO. *v.* CORRIGAN.

1889. 46 *Ohio State Reports*, 283.[1]

Error to Circuit Court of Cuyahoga County.

The plaintiff below, John Corrigan, an infant under the age of fourteen, by his guardian, sued the Rolling Mill Company for damages suffered while in the defendants' employ, and which he alleged were caused by their negligence.

The answer of the defendants alleged, among other defences, that the injury occurred solely through the plaintiff's fault.

As to this ground of defence, the Court instructed the jury in part as follows: —

It was the duty of the plaintiff to use ordinary care and prudence; just such care and prudence as a boy of his age, of ordinary care and prudence, would use under like or similar circumstances. You should take into consideration his age, the judgment and knowledge he possessed. *Verdict and judgment for plaintiff.*

The Company filed its petition in error.

Williamson, Beach & Cushing, for plaintiff in error.

Robison & Rogers, for defendant in error.

Williams, J. The only questions presented in this case are those arising upon the special instructions given by the Court in response to the request of the jury. These instructions, the plaintiff in error contends, are erroneous in their entirety and in detail.

1. First, it is claimed that the Court erred in the statement of the plaintiff's duty, in the opening proposition of the charge, wherein the jury were instructed that "it was the duty of the plaintiff to use ordinary care," which the Court defined to be "just such care as boys of that age, of ordinary care and prudence, would use under like circumstances," and that the jury "should take into consideration the age of the plaintiff, and the judgment and knowledge he possessed." We have found no decision of this Court upon the subject of the contributory negligence of infants, or the measure of care required of them. Elsewhere the decisions are conflicting. Each of three different rules on the subject has found judicial sanction. One rule requires of children the same standard of care, judgment, and discretion, in anticipating and avoiding injury, as adults are bound to exercise. Another wholly exempts small children from the doctrine of contributory negligence. Between these extremes a third and more reasonable rule has grown into favor, and is now supported by the great weight of authority, which is, that a child is held to no greater care than is usually possessed by children of the same age. Authors and judges, however, do not always employ the same language in giving expression

[1] Statement of facts abridged. Only so much of the case is given as relates to one point. Arguments omitted. — Ed.

to the rule. In Beach on Contributory Negligence, sec. 46, it is thus expressed: "An infant plaintiff who, on the one hand, is not so young as to escape entirely all legal accountability, and on the other hand is not so mature as to be held to the responsibility of an adult is, of course, in cases involving the question of negligence, to be held responsible for ordinary care, and ordinary care must mean, in this connection, that degree of care and prudence which may reasonably be expected of a child." The decisions enforcing this rule, that children are to be held responsible only for such degree of care and prudence as may reasonably be expected of them, taking due account of their age and the particular circumstances, are very numerous. "It is well settled," says Mr. Justice Hunt in *Railroad Company* v. *Stout*, 17 Wall. 657, "that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. . . . The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case." In Shearman & Redfield on Negligence, sec. 73, it is said to be "now settled by the overwhelming weight of authority that a child is held, as far as he is personally concerned, only to the exercise of such care and discretion as is reasonably to be expected from children of his own age." Another author says, "A child is only bound to exercise such a degree of care as children of his particular age may be presumed capable of exercising." Whittaker's Smith on Neg., 411.

This rule appears to rest upon sound reason as well as authority. To constitute contributory negligence in any case there must be a want of ordinary care and a proximate connection between such want of care and the injury complained of; and ordinary care is that degree of care which persons of ordinary care and prudence are accustomed to use under similar circumstances. Children constitute a class of persons of less discretion and judgment than adults, of which all reasonably informed men are aware. Hence ordinarily prudent men reasonably expect that children will exercise only the care and prudence of children, and no greater degree of care should be required of them than is usual under the circumstances among careful and prudent persons of the class to which they belong. We think it a sound rule, therefore, that in the application of the doctrine of contributory negligence to children, in actions by them or in their behalf for injuries occasioned by the negligence of others, their conduct should not be judged by the same rule which governs that of adults, and while it is their duty to exercise ordinary care to avoid the injuries of which they complain, ordinary care for them is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under similar circumstances.

That portion of the charge of the Court under discussion is in substantial conformity to this conclusion. The care and prudence which a boy of the plaintiff's age of ordinary care and prudence "would use

under like and similar circumstances," as expressed in the charge, is such care as "is reasonably to be expected from a boy of his age," or "which boys of his age usually exercise," as the books express it. No different effect is given to the charge of which the plaintiff in error can complain, by the direction to the jury to take into consideration the age of the boy "and the judgment and knowledge he possessed." This did not diminish the degree of care required by the previous portion of the instruction.

[Remainder of opinion omitted.] *Judgment affirmed.*[1]

STONE, AS ADMINISTRATOR, *v.* DRY DOCK, &c. CO.

1889. 115 *New York Reports*, 104.[2]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 26, 1887, which affirmed a judgment in favor of defendant, entered upon an order nonsuiting plaintiff on trial.

This was an action to recover damages for the alleged negligence in causing the death of plaintiff's intestate, a child of seven years and three or four months old.

The facts, so far as material, are stated in the opinion.

Adolph L. Sanger, for appellant.

John M. Scribner, for respondent.

ANDREWS, J. The nonsuit was placed on the ground that an infant seven years of age was *sui juris*, and that the act of the child in crossing the street in front of the approaching car was negligence on her part, which contributed to her death, and barred a recovery. We think the case should have been submitted to the jury.

The negligence of the driver of the car is conceded. His conduct in driving rapidly along Canal Street at its intersection with Orchard Street, without looking ahead, but with his eyes turned to the inside of the car, was grossly negligent. *Mangam* v. *Brooklyn R. R. Co.*, 38 N. Y. 455; *Railroad Co.* v. *Gladmon*, 15 Wall. 401. It cannot be asserted as a proposition of law that a child just passed seven years of age is *sui juris*, so as to be chargeable with negligence. The law does not define when a child becomes *sui juris*. *Kunz* v. *City of Troy*, 104 N. Y. 344. Infants under seven years of age are deemed

[1] Children are seldom made defendants in actions for negligence. Most of the discussions as to the standard of care required of children are to be found in cases where the children, or their parents or representatives, were plaintiffs seeking to recover for damage to the children alleged to be caused by defendant's negligence, and where the defendant contended that the action was barred by the contributory negligence of the child.

In connection with *Cleveland, &c., Co.* v. *Corrigan* and the two following cases, see also *Holmes* v. *Missouri Pacific R. Co.*, 207 Missouri, 149, and *Culberson* v. *Crescent City R. R. Co.*, 48 La. Ann., Part 2, 1376; both stated *post* in the chapter on Contributory Negligence, chapter vii, section 2. — ED.

[2] Arguments and part of opinion omitted. — ED.

incapable of committing crime, and by the common law such incapacity presumptively continues until the age of fourteen. An infant between those ages was regarded as within the age of possible discretion, but on a criminal charge against an infant between those years the burden was upon the prosecutor to show that the defendant had intelligence and maturity of judgment sufficient to render him capable of harboring a criminal intent. 1 Arch. 11. The Penal Code preserves the rule of the common law except that it fixes the age of twelve instead of fourteen as the time when the presumption of incapacity ceases. Penal Code, §§ 18, 19.

In administering civil remedies the law does not fix any arbitrary period when an infant is deemed capable of exercising judgment and discretion. It has been said in one case that an infant three or four years of age could not be regarded as *sui juris*, and the same was said in another case of an infant five years of age. *Mangam* v. *Brooklyn R. R.*, *supra; Fallon* v. *Central Park, N. & E. R. R. R. Co.*, 64 N. Y. 13. On the other hand, it was said in *Cosgrove* v. *Ogden*, 49 N. Y. 255, that a lad six years of age could not be assumed to be incapable of protecting himself from danger in streets or roads, and in another case that a boy of eleven years of age was competent to be trusted in the streets of a city. *McMahon* v. *Mayor, &c.*, 33 N. Y. 642. From the nature of the case it is impossible to prescribe a fixed period when a child becomes *sui juris*. Some children reach the point earlier than others. It depends upon many things, such as natural capacity, physical conditions, training, habits of life, and surroundings. These and other circumstances may enter into the question. It becomes, therefore, a question of fact for the jury where the inquiry is material unless the child is of so very tender years that the Court can safely decide the fact. The trial Court misapprehended the case of *Wendell* v. *New York Central Railroad Company*, 91 N. Y. 420, in supposing that it decided, as a proposition of law, that a child of seven years was capable of exercising judgment so as to be chargeable with contributory negligence. It was assumed in that case, both on the trial and on appeal, that the child whose conduct was in question was capable of understanding, and did understand the peril of the situation, and the evidence placed it beyond doubt that he recklessly encountered the danger which resulted in his death. The boy was familiar with the crossing, and, eluding the flagman who tried to bar his way, attempted to run across the track in front of an approaching train in plain sight, and unfortunately slipped and fell, and was run over and killed. It appeared that he was a bright, active boy, accustomed to go to school and on errands alone, and sometimes was intrusted with the duty of driving a horse and wagon, and that on previous occasions he had been stopped by the flagman while attempting to cross the track in front of an approaching train, and had been warned of the danger. The Court held, upon this state of facts, that the boy was guilty of culpable negligence. But the case does not decide, as matter of law, that all children of the age of seven years are *sui juris*.

We are inclined to the opinion that in an action for an injury to a child of tender years, based on negligence, who may or may not have been *sui juris* when the injury happened, and the fact is material as bearing upon the question of contributory negligence, the burden is upon the plaintiff to give some evidence that the party injured was not capable, as matter of fact, of exercising judgment and discretion. This rule would seem to be consistent with the principle now well settled in this State, that in an action for a personal injury, based on negligence, freedom from contributory negligence on the part of the party injured is an element of the cause of action. In the present case the only fact before the jury bearing upon the capacity of the child whose death was in question was that she was a girl seven years and three months old. This, we think, did not alone justify an inference that the child was incapable of exercising any degree of care. But, assuming that the child was chargeable with the exercise of some degree of care, we think it should have been left to the jury to determine whether she acted with that degree of prudence which might reasonably be expected, under the circumstances, of a child of her years. This measure of care is all that the law exacts in such a case. *Thurber* v. *Harlem, B. M. & F. R. R. Co.*, 60 N. Y. 335.

[Remainder of opinion omitted.] *Judgment reversed.*

ILLINOIS IRON AND METAL COMPANY *v.* WEBER.

1902. 196 *Illinois*, 526.[1]

APPEAL by original defendants from the decision of the Appellate Court for the First District; 89 Ill. App. 368.

Plaintiff was a newsboy, between eleven and twelve years old, and his stand was at Dearborn and Monroe streets in the city of Chicago. He was going from his home, about four miles distant, to his place of business. By permission of the driver, he got on a wagon loaded with brick. He stood up on the rear of the wagon behind the box, and held on to the hind end-gate of the wagon. The wagon was one of a procession of loaded teams in a street-car track. The next wagon behind was owned by defendant. The end of the pole of defendant's wagon struck the plaintiff's leg, inflicting a serious wound. Plaintiff had been in the paper business since he was nine years old, and had been in the habit of riding down town on wagons.

Under instructions, the substance of which is stated in the opinion, the jury found a verdict for plaintiff.

Kerr & Barr, for appellant.

John F. Waters and *C. H. Johnson*, for appellee.

CARTWRIGHT, J. . . . The first two instructions each directed the jury

[1] Statement abridged. Only so much of the opinion is given as relates to a single point. — ED.

to find the defendant guilty, provided they should believe, from the evidence, the existence of certain facts. One of the essential facts which the law required to be found was that the plaintiff was in the exercise of ordinary care for his own safety, and each of those instructions informed the jury that the fact was proved if he was in the exercise of ordinary care for a boy of his age. They directed the jury to return a verdict for the plaintiff if they found he was in the exercise of ordinary care for a boy of his age and the defendant was negligent and the injury resulted. That was not a correct rule of law, since the question of care was not to be determined alone by the plaintiff's age, but also from his intelligence, experience, and ability to understand and comprehend dangers and care for himself. The case was one in which the defendant was entitled to correct instructions upon that question. It was a question whether plaintiff was not guilty of negligence in riding where he did, in a procession of teams, outside of the box, behind the end-gate of the wagon. The position was a dangerous one, not provided or used for passengers or intended for such use. Plaintiff had a right to ride on the wagon with the driver's consent, but it was his duty to use reasonable care for his own safety. There was a string of heavily loaded teams in the car tracks, where it was difficult, if not impossible, to turn out, and the difficulty and danger in stopping when one of a procession stops is matter of common knowledge. Cases cited as to the liability of common carriers of passengers where a car is full and a passenger rides upon the platform have no bearing on this question. Passengers are accustomed to be upon platforms and are sometimes compelled to ride there, and different rules are applied to a common carrier from those governing parties not in that relation. There was no necessity whatever for the plaintiff assuming the position that he did. These facts were not controverted or in dispute, but are gathered from his own testimony. If the damage to the plaintiff was caused by his own negligence in assuming such a position, he could not recover. In determining that question his age was to be taken into account, but it could not be said, as a matter of law, that he was too young to exercise any care for his personal safety or that he was incapable of negligence. Unquestionably, he was capable of exercising some degree of judgment and discretion and some degree of care for his own safety. He had lived in the city and had been engaged in business, and was accustomed to ride on wagons. Judge Thompson, in his Commentaries on Law of Negligence (vol. i, sect. 309), says: "Two lads of equal age and natural capacity, one of them raised in the country and the other in the city, might approach a given danger, and the one would be perfectly competent to care for himself while the other would be helpless in the face of it. Therefore the capacity, the intelligence, the knowledge, the experience, and the discretion of the child are always evidentiary circumstances, — circumstances with reference to which each party has the right to introduce evidence, which evidence is to be considered by the jury." The rule

established by our own decisions is, that age is not the only element to be considered, but that intelligence, capacity, and experience are also to be taken into account. *Weick* v. *Lander*, 75 Ill. 93; *City of Chicago* v. *Keefe*, 114 Id. 222; *Illinois Central Railroad Company* v. *Slater*, 129 Id. 91.

. . . . . .

Reversed and remanded.[1]

HILL *v.* GLENWOOD.

1904. 124 *Iowa*, 479.[2]

WEAVER, J. The blind plaintiff claims to have been injured upon one of the public walks in the city of Glenwood, and that such injury was occasioned by reason of the negligence of the city in the maintenance of the walk at the place of the accident, and without fault on his own part contributing thereto. From verdict and judgment in his favor for $665, the city appeals. In this court the appellant makes no claim that the city was not negligent, but a reversal is sought on other grounds.

. . . . . .

It was shown without dispute that plaintiff had been blind for many years, and this fact is the basis of the criticism upon the charge given to the jury. In the third paragraph of the charge, the court, defining negligence, said: "(3) Negligence is defined to be the want of ordinary care; that is, such care as an ordinarily prudent person would exercise under like circumstances. There is no precise definition of ordinary care, but it may be said that it is such care as an ordinarily prudent person would exercise under like circumstances, and should be proportioned to the danger and peril reasonably to be apprehended from a lack of proper prudence. This rule applies alike to both parties to this action, and may be used in determining whether either was negligent." In the eighth paragraph, referring to the plaintiff's duty to exercise care for his own safety, the following language is used: "(8) It must also appear from the evidence that the plaintiff did not in any way contribute to the happening of the acci-

[1] As to experience, see 161 Missouri, 146.

Section 2901 of the Georgia Civil Code is as follows: —

"Due care in a child of tender years is such care as its capacity, mental and physical, fits it for exercising in the actual circumstances of the occasion and situation under investigation."

In *Harrington* v. *Mayor of Macon*, 125 Georgia, 58, p. 60, LUMPKIN, J., said: "The average child of its own age is not the standard by which to measure its legal diligence with exactness. 'Such care as the capacity of the particular child enables it to use naturally and reasonably, is what the law requires.'" Compare BLECKLEY, C. J., in *Western & Atlantic R. R.* v. *Young*, 81 Georgia, 397, 416, 417. — ED.

[2] Only part of the opinion is given. — ED.

dent in question by any negligence on his part; that is, by his own want of ordinary care. The plaintiff, on his part, was under obligation to use ordinary care to prevent injury when passing over any sidewalk; and if he failed so to do, and his failure in any way contributed to the happening of the accident in question, then he cannot recover herein. The evidence shows without dispute that he was blind, and this fact should be considered by you in determining what ordinary care on his part would require when he was attempting to pass over one of the sidewalks of this city." Counsel for appellant do not deny that the rules here laid down would be a correct statement of the law of negligence and contributory negligence as applied to the ordinary case of sidewalk accident, but it is urged that the conceded fact of plaintiff's blindness made it the duty of the court to say to the jury that a blind person who attempts to use the public street "must exercise a higher degree of care and caution than a person ordinarily would be expected or required to use had he full possession of his sense of sight." We cannot give this proposition our assent. It is too well established to require argument or citation of authority that the care which the city is bound to exercise in the maintenance of its streets is ordinary and reasonable care, the care which ordinarily marks the conduct of a person of average prudence and foresight. So, too, it is equally well settled that the care which a person using the street is bound to exercise on his own part to discover danger and avoid accident and injury is of precisely the same character, the ordinary and reasonable care of a person of average prudence and foresight. The streets are for the use of the general public without discrimination; for the weak, the lame, the halt and the blind, as well as for those possessing perfect health, strength, and vision. The law casts upon one no greater burden of care than upon the other. It is true, however, that in determining what is reasonable or ordinary care we must look to the circumstances and surroundings of each particular case. As said by us in *Graham* v. *Oxford*, 105 Iowa, 708: "There is no fixed rule for determining what is ordinary care applicable to all cases, but each case must be determined according to its own facts." In the case before us the plaintiff's blindness is simply one of the facts which the jury must give consideration, in finding whether he did or did not act with the care which a reasonably prudent man would ordinarily exercise, when burdened by such infirmity. In other words, the measures which a traveler upon the street must employ for his own protection depend upon the nature and extent of the peril to which he knows, or in the exercise of reasonable prudence ought to know, he is exposed. The greater and more imminent the risk, the more he is required to look out for and guard against injury to himself; but the care thus exercised is neither more nor less than ordinary care — the care which men of ordinary prudence and experience may reasonably be expected to exercise under like circumstances. See cases cited in 21 Am. & Eng. Enc. Law (2d Ed.), 465, note 1. In

the case at bar (the plaintiff was rightfully upon the street, and if he was injured by reason of the negligence of the city, and without contributory negligence on his part, he was entitled to a verdict.) In determining whether he did exercise due care it was proper for the jury, as we have already indicated, to consider his blindness, and in view of that condition, and all the surrounding facts and circumstances, find whether he exercised ordinary care and prudence. If he did, he was not guilty of contributory negligence.

This view of the law seems to be fairly embodied in the instructions to which exception is taken. If the appellant believed, as it now argues, that the charge should have been more specific, and dwelt with greater emphasis upon the fact of plaintiff's blindness as an element for the consideration of the jury in finding whether he exercised reasonable care, it had the right to ask an instruction framed to meet its views in that respect. No such request was made, and the omission of the court to so amplify the charge on its own motion was not error.

KEITH *v.* WORCESTER, &c., STREET R. R. CO.

SAME *v.* INHABITANTS OF MILLBURY.

1907. 196 *Massachusetts*, 478.[1]

TWO ACTIONS OF TORT for personal injuries received by the plaintiff's intestate caused by her falling when stepping across street railway rails which were piled by the defendant street railway company on the highway next to the curbing, and were allowed by the street railway company and the defendant town to remain there, and which, it was alleged, constituted an obstruction of the highway.

The accident happened in the daytime. The plaintiff's intestate was near-sighted, and could not recognize a friend at a distance of more than ten or twelve feet.

At the trial in the Superior Court, defendants requested the following instruction: —

"If the plaintiff's intestate had defective eyesight, she should take greater care in walking the street than one of good eyesight; and if she failed to use this greater degree of care, the verdict must be for the defendant."

This request was refused, subject to exception.

In the charge to the jury, the presiding judge stated: "The plaintiff contends and has got to show by a fair preponderance of the evidence that Mrs. Keith was injured, and that she was injured while she was using . . . a degree of care that a reasonably prudent and careful person, acting prudently and carefully at the time, would have exercised and should have exercised in your judgment under all the cir-

[1] Statement abridged. Part of opinion omitted. — ED.

cumstances then surrounding Mrs. Keith. That means not only external circumstances, that means not only the way in which the rails were placed, the location of the car, the necessity of action on her part, but it means also with reference to her personal peculiarities as they were shown to exist upon the stand. For instance, the conduct of a perfectly sound and healthy person may be properly regarded as one thing, when the same conduct on the part of a diseased or infirm person might be regarded as something very different.

"What might be in your judgment perfectly reasonable and proper and careful on the part of a sound person might be regarded fairly by you as improper and careless on the part of an infirm person.

"So, in this case, while I cannot instruct you as a matter of law that Mrs. Keith, if you find her to be near-sighted, was bound to use a higher degree of care than a person not near-sighted, I have got to leave it to you as a matter of fact whether a near-sighted person would not, in order to be careful, have to exercise a higher degree of care than a person not near-sighted. In other words, I have got to leave it to you to determine whether or not a near-sighted person is using due care if he or she under the particular circumstances acts exactly as a person who was not near-sighted would have done. In other words, it is a matter of fact for you to determine whether Mrs. Keith was called on to do differently from a person in full possession of eyesight rather than as a matter of law for me to direct you in regard to it."

The jury found for the plaintiff in both cases.

E. H. Vaughan (*R. T. Esty* with him), for defendants.

J. A. Thayer, for plaintiff.

RUGG, J. . . . The defendant asked the court to rule that if the person injured "had defective eyesight, she should take greater care in walking the street than one of good sight, and if she failed to use this greater degree of care the verdict must be for the defendant." This request properly was refused, for the reason that it directed a verdict upon a single phase of the testimony, which was not necessarily decisive. In this respect the prayer differs vitally from the one which in *Winn* v. *Lowell*, 1 Allen, 177, this court held should have been given.[1] We see no reason for modifying the decision in *Winn* v. *Lowell*, nor is it inconsistent with subsequent cases. The standard of care established by the law is what the ordinarily prudent and cautious person would do to protect himself under given conditions. There is no higher or different standard for one who is aged, feeble, blind, halt, deaf or otherwise impaired in capacity, than for one in perfect physical condition. It has frequently, in recent as well as earlier cases, been said, in referring to one under some impediment, that

[1] The instruction which the court held should have been given in *Winn* v. *Lowell*, was: "If the plaintiff was a person of poor sight, common prudence required of her greater care in walking upon the streets, and avoiding obstructions, than is required of persons of good sight." — ED.

greater caution or increased circumspection may be required in view of these adverse conditions. See, for example, *Winn* v. *Lowell*, 1 Allen, 177; *Hall* v. *West End Street Railway*, 168 Mass. 461; *Hilborn* v. *Boston & Northern Street Railway*, 191 Mass. 14; *Vecchioni* v. *New York Central & Hudson River Railroad*, 191 Mass. 9; *Hawes* v. *Boston Elevated Railway*, 192 Mass. 324; *Hamilton* v. *Boston & Northern Street Railway*, 193 Mass. 324. These expressions mean nothing more than that a person so afflicted must put forth a greater degree of effort than one not acting under any disabilities, in order to attain that standard of care which the law has established for everybody. When looked at from one standpoint, it is incorrect to say that a blind person must exercise a higher degree of care than one whose sight is perfect, but in another aspect, a blind person may be obliged to take precautions, practice vigilance and sharpen other senses, unnecessary for one of clear vision, in order to attain that degree of care which the law requires. It may depend in some slight degree upon how the description of duty begins, where the emphasis may fall at a given moment, but when the whole proposition is stated, the rights of the parties are as fully protected in the one way as in the other. It is perhaps more logical to say that the plaintiff is bound to use ordinary care, and that in passing upon what ordinary care demands, due consideration should be given to blindness or other infirmities. This was the course pursued by the Superior Court. *Neff* v. *Wellesley*, 148 Mass. 487. *Smith* v. *Wildes*, 143 Mass. 556. But it is also correct to say that in the exercise of common prudence one of defective eyesight must usually as matter of general knowledge take more care and employ keener watchfulness in walking upon the streets and avoiding obstructions than the same person with good eyesight, in order to reach the standard established by the law for all persons alike, whether they be weak or strong, sound or deficient.

Exceptions overruled.

TRACY *v.* WOOD.

1822. 3 *Mason (U. S. Circuit Court)*, 132.[1]

In U. S. Circuit Court for the District of Rhode Island.

Assumpsit for negligence in losing 764½ doubloons, intrusted to the defendant to be carried from New York to Boston, as a gratuitous bailee. The gold was put up in two distinct bags, one within the other, and at the trial, upon the general issue, it appeared that the defendant, who was a money broker, brought them on board of the steamboat bound from New York to Providence; that in the morning while the steamboat lay at New York, and a short time before sailing, one of the bags was discovered to be lost, and that the other bag was left

[1] Arguments omitted. — Ed.

by the defendant on a table in his valise in the cabin, for a few moments only, while he went on deck to send information of the supposed loss to the plaintiffs, there being then a large number of passengers on board, and the loss being publicly known among them. On the defendant's return the second bag was also missing, and after every search no trace of the manner of the loss could be ascertained. The valise containing both bags was brought on board by the defendant on the preceding evening, and put by him in a birth in the forward cabin. He left it there all night, having gone in the evening to the theatre, and on his return having slept in the middle cabin. The defendant had his own money to a considerable amount in the same valise. There was evidence to show that he made inquiries on board, if the valise would be safe, and that he was informed, that if it contained articles of value, it had better be put into the custody of the captain's clerk in the bar, under lock and key. There were many other circumstances in the case. The argument at the trial turned wholly on the question of gross negligence, and all the facts were fully commented on by counsel. But as the case is intended only to present the discussion on the question of law, it is not thought necessary to recapitulate them.

Whipple and Robbins, for defendant.

Searle and Webster, for plaintiff.

STORY, J. After summing up the facts, said, I agree to the law as laid down at the bar, that in cases of bailees without reward, they are liable only for gross negligence. Such are depositaries, or persons receiving deposits without reward for their care; and mandataries, or persons receiving goods to carry from one place to another without reward. The latter is the predicament of the defendant. He undertook to carry the gold in question for the plaintiff, gratuitously, from New York to Providence, and he is not responsible unless he has been guilty of gross negligence. Nothing in this case arises out of the personal character of the defendant, as broker. He is not shown to be either more or less negligent than brokers generally are; nor if he was, is that fact brought home to the knowledge of the plaintiffs. They confided the money to him as a broker of ordinary diligence and care, having no other knowledge of him; and, therefore, no question arises as to what would have been the case, if the plaintiffs had known him to be a very careless or a very attentive man.[1] The language of the books, as to what constitutes gross negligence, or not, is sometimes loose and inaccurate from the general manner in which propositions are stated. When it is said, that gross negligence is equivalent to fraud, it is not meant that it cannot exist without fraud. There may be very gross negligence in cases where there is no pretence that the party has been guilty of fraud, though certainly such negligence is often presumptive of fraud. In determining what is gross negli-

[1] Jones' Bail. 46.

gence, we must take into consideration what is the nature of the thing bailed. If it be of little value, less care is required than if it be of great value. If a bag of apples were left in a street for a short time, without a person to guard it, it would certainly not be more than ordinary neglect. But if the bag were of jewels or gold, such conduct would be gross negligence. In short, care and diligence are to be proportional to the value of the goods, the temptation and facility of stealing them, and the danger of losing them. So Sir William Jones lays down the law. "Diamonds, gold, and precious trinkets," says he, "ought from their nature to be kept with peculiar care, under lock and key; it would, therefore, be gross negligence in a depositary to leave such deposit in an open antechamber; and *ordinary* neglect, at least, to let them remain on the table, where they might possibly tempt his servants."[1] So in *Smith* v. *Horne*, 2 Moore's R. 18, it was held to be gross negligence in the case of a carrier, under the usual notice of not being responsible for goods above £5 in value, to send goods in a cart with one man, when two were usually sent to see to the delivery of them. So in *Booth* v. *Wilson*, 1 Barn. & Ald. 59, it was held gross negligence in a gratuitous bailee to put a horse into a dangerous pasture. In *Batson* v. *Donovan*, 4 Barn. & Ald. 21, the general doctrine was admitted in the fullest terms. It appears to me that the true way of considering cases of this nature is, to consider whether the party has omitted that care which bailees, without hire, or mandataries of ordinary prudence usually take of property of this nature. If he has, then it constitutes a case of gross negligence. The question is not whether he has omitted that care, which very prudent persons usually take of their own property, for the omission of that would be but slight negligence; nor whether he has omitted that care which prudent persons ordinarily take of their own property, for that would be but ordinary negligence: but whether there be a want of that care, which men of common sense, however inattentive, usually take, or ought to be presumed to take of their property, for that is gross negligence. The contract of bailees without reward is not merely for good faith, but for such care as persons of common prudence in their situation usually bestow upon such property. If they omit such care, it is gross negligence.

The present is a case of a mandatary of money. Such property is by all persons, negligent as well as prudent, guarded with much greater care than common property. The defendant is a broker, accustomed to the use and transportation of money, and it must be presumed he is a person of ordinary diligence. He kept his own money in the same valise; and took no better care of it than of the plaintiff's. Still if the jury are of opinion that he omitted to take that reasonable care of the gold which bailees without reward in his situation usually take, or which he himself usually took of such property, under such circumstances, he has been guilty of gross negligence.

[1] Jones' Bail. 38, 46, 62.

Verdict for the plaintiffs for $5700, *the amount of one bag of the gold; for the defendant as to the other bag.*[1]

EXTRACTS FROM STORY ON BAILMENTS.

8th edition, sections 11, 16, 17.

Section 11. [On the subject of the various degrees of care or diligence which are recognized in the common law.]

. . . There may be a high degree of diligence, a common degree of diligence, and a slight degree of diligence; . . .

Common or ordinary diligence is that degree of diligence which men in general exact in respect to their own concerns. . . . That may be said to be common or ordinary diligence, in the sense of the law, which men of common prudence generally exercise about their own affairs in the age and country in which they live.

Section 16. Having thus ascertained the nature of ordinary diligence, we may now be prepared to decide upon the other two degrees. High or great diligence is of course extraordinary diligence, or that which very prudent persons take of their own concerns; and low or slight diligence is that which persons of less than common prudence, or indeed of any prudence at all, take of their own concerns. Sir William Jones considers the latter to be the exercise of such diligence as a man of common sense, however inattentive, takes of his own concerns. Perhaps this is expressing the measure a little too loosely; for a man may possess common sense, nay, uncommon sense, and yet be so grossly inattentive to his own concerns as to deserve the appellation of having no prudence at all. The measure is rather to be drawn from the diligence which men, habitually careless or of little prudence (not "however inattentive" they may be), generally take in their own concerns.

Section 17. Having, then, arrived at the three degrees of diligence, we are naturally led to those of negligence, which correspond thereto; for negligence may be ordinary, or less than ordinary, or more than ordinary. Ordinary negligence may be defined to be the want of ordinary diligence, and slight negligence to be the want of great diligence, and gross negligence to be the want of slight diligence. For he who is only less diligent than very careful men cannot be said to be more than slightly inattentive; he who omits ordinary care is a little more negligent than men ordinarily are; and he who omits even slight diligence fails in the lowest degree of prudence, and is deemed grossly negligent.[2] . . .

[1] A fuller statement of the views of the learned judge may be found in the extracts, which follow in the text above, from his work on Bailments. — Ed.

[2] For opinions tending in the same direction, see Woodruff, J., in *French* v. *Buffalo & Erie R. R.*, 2 Abbott, New York Court of Appeals Decisions, 196, pp. 200, 201; *Same Case*, 4 Keyes, 108, pp. 113, 114; Cassoday, C. J., in *Lockwood* v. *Belle City Street R. Co.*, 92 Wisconsin, 97, pp. 111–113; Searls, Com., in *Redington* v. *Pacific, &c., Co.*, 107 Calif. 317, pp. 323, 324. — Ed.

CURTIS, J., IN STEAMBOAT NEW WORLD *v.* KING.

1853. 16 *Howard*, 469, pp. 474, 475.

THE theory that there are three degrees of negligence described by the terms slight, ordinary, and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation. In *Storer* v. *Gowen*, 18 Maine, 177, the Supreme Court of Maine says: "How much care will, in a given case, relieve a party from the imputation of gross negligence, or what omission will amount to the charge, is necessarily a question of fact, depending on a great variety of circumstances which the law cannot exactly define." Mr. Justice Story, Bailments, § 11, says: "Indeed, what is common or ordinary diligence is more a matter of fact than of law." If the law furnishes no definition of the terms gross negligence, or ordinary negligence, which can be applied in practice, but leaves it to the jury to determine, in each case, what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned.

Recently, the judges of several courts have expressed their disapprobation of these attempts to fix the degrees of diligence by legal definitions, and have complained of the impracticability of applying them. *Wilson* v. *Brett*, 11 Meeson and Wels. 113; *Wyld* v. *Pickford*, 8 ibid. 443, 461, 462; *Hinton* v. *Dibbin*, 2 Q. B. 646, 651. It must be confessed that the difficulty in defining gross negligence, which is apparent in perusing such cases as *Tracy et al.* v. *Wood*, 3 Mason, 132, and *Foster* v. *The Essex Bank*, 17 Mass. 479, would alone be sufficient to justify these complaints. It may be added that some of the ablest commentators on the Roman law, and on the civil code of France have wholly repudiated this theory of three degrees of diligence, as unfounded in principles of natural justice, useless in practice, and presenting inextricable embarrassments and difficulties. See Toullier's Droit Civil, 6th vol., p. 239, &c.; 11th vol., p. 203, &c.; Makeldey, Man. Du Droit Romain, 191, &c.

GRILL *v.* GENERAL IRON SCREW COLLIER COMPANY.

1866. *Law Reports,* 1 *Common Pleas,* 600.[1]

DECLARATION, alleging that plaintiff's goods were shipped on defendants' vessel, under a bill of lading whereby the goods were to be safely carried subject to the provision, "accidents or damage of the seas . . . of whatever nature or kind soever, excepted"; that by the negligence of defendants' crew the vessel collided with another vessel; and that thereby plaintiff's goods were sunk.

Third plea — that the defendants were prevented from carrying and delivering the goods by the excepted perils.

Special replication to third plea — [in substance] that the supposed excepted perils in the third plea mentioned consisted wholly of the collision in the declaration mentioned; and that the collision was caused by "the gross negligence, carelessness, mismanagement, and improper conduct of the defendants, by their servants and mariners in that behalf."

Issue thereon.

At the trial, ERLE, C. J., left it to the jury to say whether the collision which caused the loss of the goods "was occasioned by the negligence of the crew of the defendants."

The jury found that there was negligence on the part of the defendants' vessel, which caused the collision.

A verdict was entered for plaintiff.

Rule *nisi* for a new trial, on the grounds [*inter alia*] that the judge ought to have told the jury that the loss was caused by peril of the seas within the meaning of the bill of lading; and that he ought to have left to the jury whether the peril "was caused by gross negligence."

Sir R. P. Collier, Solicitor-General, Hannen and Cohen, showed cause.

Edward James, Q. C., Karslake, Q. C., and *Sir G. Honyman,* in support of the rule.

WILLES, J. . . .

[The court *held,* that a collision arising from the negligence of the crew of the ship is not a peril of the sea within the meaning of the exception in the bill of lading.]

It is further complained that the Lord Chief Justice misdirected the jury, because he made no distinction in this case between gross and ordinary negligence. No information, however, has been given us as to the meaning to be attached to gross negligence in this case; and I quite agree with the dictum of Lord Cranworth in *Wilson* v. *Brett,*[2] that gross negligence is ordinary negligence with a vituperative

[1] Statement abridged. Only part of case is given. Arguments omitted. — ED.

[2] 11 M. & W. 113.

epithet, — a view held by the Exchequer Chamber: *Beal* v. *South Devon Railway Company.*[1] Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use. A bailee is only bound to use the ordinary care of a man, and so the absence of it is called gross negligence. A person who undertakes to do some work for reward to an article must exercise the care of a skilled workman, and the absence of such care in him is negligence. Gross, therefore, is a word of description, and not a definition; and it would have been only introducing a source of confusion to use the expression gross negligence, instead of the equivalent, a want of due care and skill in navigating the vessel, which was again and again used by the Lord Chief Justice in his summing up.

KEATING, J., concurred.

MONTAGUE SMITH, J. . . . Next it is objected that he ought to have left the question whether there was *gross* negligence. I do not see what more he could have said, except it was to use the very word "gross"; but it certainly would not have enlightened the jury to use an indefinite word without explaining it, and no different explanation has been suggested from that which his summing up in fact contained. The use of the term gross negligence is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailees, and it is more correct and scientific to define the degrees of care than the degrees of negligence. In this case it was unnecessary to define the degrees of care, and the replication would have been equally good without the word gross. . . .

ERLE, C. J. I have nothing to add.

Rule discharged.

MEREDITH *v.* REED.

1866. 26 *Indiana*, 334.

APPEAL FROM THE WAYNE COMMON PLEAS.

GREGORY, C. J. Meredith sued Reed before a justice for an injury done by a stallion of the latter to the mare of the former, resulting in the death of the mare. Jury trial, verdict for the defendant; motion for a new trial overruled and judgment. The evidence is in the record. The facts are substantially as follows: In May, 1865, the defendant owned a stallion, which had previously been let to mares, but owing to the sickness of the owner, was not so let during the spring of 1865. He was a gentle stallion, and had never been known by the owner to be guilty of any vicious acts. Not being in use, he had been kept up in a stable for four or five months. He was secured in the stable by

[1] 3 H. & C. 337.

a strong halter and chain fastened through an iron ring in the manger. The stable door was securely fastened on the inside by a strong iron hasp, passed over a staple, and a piece of chain passed two or three times through the staple over the hasp, and the ends firmly tied together with a strong cord. It was also fastened on the outside by a piece of timber, one end of which was planted in the ground, while the other rested against the door. The horse was thus secured on the day and night the injury occurred. The gate of the enclosure surrounding the stable was shut and fastened as usual. About 11 o'clock that night the horse was found loose on the highway, and did the injury complained of. Early the following morning the outside gate was found open; the stable door was found open, with the log prop lying some distance to one side, and the chain which had been passed through the staple was gone, and the cord with which it had been tied was found cut and the pieces lying on the floor.

There are forty-two alleged errors assigned, but many of them are not, in our opinion, so presented as to entitle them to consideration in this Court. So far as the substantial rights of the appellant are involved, all the questions properly presented resolve themselves into the inquiry as to the nature and extent of the liability of the owner of a domestic animal for injuries done by it to the personal property of another, disconnected from any trespass to real estate.

It is contended, on the one hand, that ordinary care was all the law required of the defendant in this case. On the other it is claimed that the utmost care was necessary to free him from liability. Ordinary care is all that the law required in the case in judgment. What is ordinary care in some cases would be carelessness in others. The law regards the circumstances surrounding each case, and the nature of the animal or machinery under control. Greater care is required to be taken of a stallion than of a mare; so in the management of a steam-engine, greater care is necessary than in the use of a plow. Yet it is all ordinary care; such care as a prudent, careful man would take under like circumstances. The degree of care is always in proportion to the danger to be apprehended. The case at bar was properly sent to the jury, and the verdict is fully sustained by the evidence.

The judgment is affirmed, with costs.

W. A. Bickle, for appellant.

J. P. Siddall and *C. H. Burchenal*, for appellee.

DENVER, &c., ELECTRIC COMPANY *v.* SIMPSON.

1895. 21 *Colorado*, 371.[1]

ACTION for damage caused to plaintiff, while passing along a public alley, by his coming in contact with one of defendants' wires heavily charged with electricity, which had become detached from its overhead fastening, and was hanging down to within about two feet of the ground. At the trial there was some evidence tending to show that the position of the wire was due to the negligence of the defendants. Verdict for plaintiff, and judgment thereon. Defendant appealed; alleging as one ground the giving of certain instructions as to the care required by defendant. Those instructions are stated in the opinion.

Wolcott & Vaile and *H. F. May*, for appellant.

E. Caypless, H. N. Sales, and *E. Keeler*, for appellee.

CAMPBELL, J. . . . This court does not recognize any degrees of negligence, such as slight or gross, and logically it ought not to recognize any degrees in its antithesis, care. The court instructed the jury in this case that the defendant was not an insurer of the safety of plaintiff, but that in constructing its line and maintaining the same in repair, it was held to the utmost degree of care and diligence; that in this respect it is bound to the highest degree of care, skill, and diligence in the construction and maintenance of its lines of wire and other appurtenances, and in carrying on its business, so as to make the same safe against accidents so far as such safety can, by the use of such care and diligence, be secured. If it observed such degree of care, it was not liable; if it failed therein, it was liable for injuries caused thereby.

We think the court was unfortunate in attempting to draw any distinctions in the degrees of care or negligence. It would have been safer and the better practice to instruct the jury, — which ought hereafter to be observed, — even in cases like the one before us, that the defendant was bound to exercise that reasonable care and caution which would be exercised by a reasonably prudent and cautious person under the same or similar circumstances. In addition to this, the jury should have been instructed that the care increases as the danger does, and that where the business in question is attended with great peril to the public, the care to be exercised by the person conducting the business is commensurate with the increased danger. But, in effect, this is what the court did. Under the facts of the case, the law required of the defendant conducting, as it did, a business so dangerous to the public, the highest degree of care which skill and foresight can attain consistent with the practical conduct of its business under the known methods and the present state of the particular art. This is

[1] Statement abridged. Only so much of the opinion is given as relates to a single point. — ED.

the measure of the duty owed by a common carrier to a passenger for hire. Thompson's Carriers of Passengers, p. 208, and cases cited. Not for the same reason, or because the doctrine rests upon the same principle, but with even greater force should this rule apply to a person or corporation engaged in the equally, if not more, dangerous business of distributing electricity throughout a city by means of wires strung over the public alleys and streets, in so far as concerned its duty to the traveling public.

In those courts where degrees of negligence are not countenanced, nevertheless, in cases where the duty of a common carrier of passengers is laid down, the jury are told that carriers are bound to the utmost degree of care which human foresight can attain. This is upon the theory that reasonable or ordinary care in a case of that kind is the highest care which human ingenuity can practically exercise, and that, as a matter of law, courts will hold every reasonable prudent and careful man to the exercise of the utmost care and diligence in protecting the public from the dangers necessarily incident to the carrying on of a hazardous business.

Where the facts of a case naturally lead equally intelligent persons honestly to entertain different views as to the degree of care resting upon a defendant, the court ought not to lay down a rule prescribing any particular or specific degree in that case. But where all minds concur — as they must in a case like the one we are now considering — in regarding the carrying on of a business as fraught with peril to the public inherent in the nature of the business itself, the court makes no mistake in defining the duty of those conducting it as the exercise of the utmost care. It was, therefore, not prejudicial error for the court to tell the jury in this case what the law requires of the defendant, viz. the highest degree of care in conducting its business.

. . . . . .

Judgment affirmed.[1]

[1] As to the care required of a steam railroad company as a common carrier of passengers, it is usual to instruct juries that, as to the condition of the road-bed and rolling stock and the management of trains, the carrier, while not an insurer, must use the highest practicable degree of care. See various forms of stating this general doctrine in 2 Hutchinson on Carriers, 3d ed., sects. 895, 896; 4 Elliott on Railroads, 1st ed., sect. 1585; 1 Shearman & Redfield on Negligence, 4th ed., sect. 51.

In Wharton on Negligence, 1st ed., sects. 636, 637, the author says that the diligence should be "that which a good carrier of the particular grade is accustomed to exert"; *i.* e. "the diligence and skill which a good business man in his specialty is accustomed to use under similar circumstances."

For a criticism of Wharton's statement, see 1 S. & R. Negl., 4th ed., sect. 43 *et seq.* And compare 2 Hutchinson on Carriers, 3d ed., sect. 897, note 13. — Ed.

LAKE ERIE & WESTERN R R. CO. *v.* FORD.

1906. 167 *Indiana*, 205.[1]

GILLETT, J. Complaint by appellee to recover damages for loss of property by fire, by reason of the alleged negligence of appellant. There was a verdict and judgment in favor of appellee.

. . . . . .

Appellant complains of appellee's instructions five and six, which were given by the court in the order indicated by their numbers. They are as follows: "(5) It is the duty of a railroad to use all reasonable precaution in running and operating its trains, and in providing its engines with proper spark-arresters, so as to prevent injury to the property of others by sparks or fire emitted or thrown therefrom. (6) If you believe from all of the evidence and circumstances in the case that at the time and prior to the destruction of the property of the plaintiff, as alleged in his complaint, there were a number of wooden buildings and structures standing on either side of the defendant's track and in close proximity thereto, including the barn or stable of said Melissa McFall in the town of Hobbs, and at such time it was, and for some time prior thereto it had been, unusually dry, thereby rendering such wood buildings and structures, including the barn or stable of said Melissa McFall, and also the property of the plaintiff herein, unusually dry, inflammable, and easily set on fire by sparks and coals of fire emitted from defendant's engines in passing through said town, and that there was also at the time, and for several hours prior thereto had been, a strong wind blowing continuously across the defendant's track, in the direction of the barn or stable of said Melissa McFall, and the wooden buildings and structures near the defendant's track, including the property of the plaintiff herein, which greatly and unusually increased the danger and risk of setting fire to such buildings by sparks and coals of fire emitted or thrown from its engine in passing through said town, over ordinary times and conditions, and all of which facts and conditions the defendant knew at the time, the defendant, under such circumstances, would be required to use a greater degree of care in operating and running its engines through said town to prevent injury to such buildings or property by sparks or coals of fire emitted or thrown from its engine, than it would at ordinary times and under ordinary conditions."

Assuming, without deciding, that it was not error for the court, in its fifth instruction, to use the term "reasonable precaution," instead of the preferable one, "ordinary care," and assuming further, since the

[1] Only so much of the case is given as relates to a single point. — ED.

care that the company was required to exercise was, so far as the element of law was concerned, to be measured by a fixed standard, which was to be fully complied with (Wharton, Negligence [2d ed.], § 46), that it was proper to use the expression "all reasonable precaution," the question arises whether it is not likely that the jury was misled by the charge in the next instruction that in the circumstances therein hypothetically stated "a greater degree of care" was required than in ordinary conditions. The sixth instruction would have been proper, had the court charged, after stating to the jury hypothetically the conditions which existed, leaving it to them to determine whether the danger was increased, that, in the event they so found, it was their duty, in determining whether reasonable or ordinary care had been exercised, to consider the increased danger of fire, yet we cannot say that this was the fair meaning of the words in which said instruction was couched.

There has been much discussion in the books concerning the correctness of the old doctrine as to degrees of negligence. *New York Central R. Co.* v. *Lockwood*, (1873) 17 Wall. 357, 21 L. Ed. 627; *Steamboat New World* v. *King*, (1853) 16 How. 469, 14 L. Ed. 1019; *Ohio, etc., R. Co.* v. *Selby*, (1874) 47 Ind. 471, 17 Am. Rep. 719; *Pennsylvania Co.* v. *Sinclair*, (1878) 62 Ind. 301, 30 Am. Rep. 185; Wharton, Negligence (2d ed.), § 44; 6 Albany L. J. 313; 2 Ames & Smith, Cases on Torts, 143; 21 Am. and Eng. Ency. Law (2d ed.), 459, and cases cited. While we apprehend that the adverse opinions which have been expressed concerning such doctrine were not intended to be understood as militating against the view that the legal standard of care is not the same in all relations, or to discountenance the practice of charging the jury in terms that indicate the extent of care required, as great, ordinary, or slight (1 Shearman & Redfield, Negligence [5th ed.], § 47), yet the point which we wish to enforce now is that in all cases negligence consists simply in a failure to measure up to the legal standard of care. It was said by Welles, J., in *Grill* v. *General Iron Screw, etc., Co.*, (1866) L. R. 1 C. P. 600, 611: "Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use."

Here we admittedly have a case in which it was the duty of the company to exercise ordinary care, but what does an instruction mean that informs the jury that in certain circumstances a greater degree of care is required, when it has for a background an instruction, which is applicable to all circumstances, that all reasonable precaution must be used? We think that in such a case the jury would understand that more than ordinary care was required, and it is not improbable that the effect of giving such an instruction, following an instruction like 5, would be to lead the jury to infer that the defendant's duty was raised by the circumstances recited to a pitch of intensity that could not reasonably have been attained.

It was said by this court in *Meredith* v. *Reed*, (1866) 26 Ind. 334,

337: "What is ordinary care in some cases, would be carelessness in others. The law regards the circumstances surrounding each case, and the nature of the animal or machinery under control. Greater care is required to be taken of a stallion than of a mare; so in the management of a steam engine, greater care is necessary than in the use of a plough. Yet it is all ordinary care." The legal standard of care required in a particular relationship is always the same, although the amount of care thus required depends upon the particular circumstances. *Cleveland, etc., R. Co.* v. *Terry*, (1858) 8 Ohio St., 570; *Weiser* v. *Broadway, etc., St. R. Co.*, (1895) 6 Ohio Dec. 215. As has been observed by a modern writer: "This standard may vary in fact, but not in law." 2 Jaggard, Torts, p. 819. In an article in 3 [6] Albany L. J. 314, it is said: "The ratio, proportion or correspondence of diligence to circumstances, of care to surroundings, is fixed and identical. And, in determining a question of diligence or negligence in either case [as between two cases previously used by way of illustration], it would be only necessary to apply the same rule to varying circumstances and persons, to demand the same ratio between varying extremes. And it is not too much to assert that all the perplexity and misunderstanding on the subject of diligence and negligence are due to the habit of confounding the specific acts and circumstances, which must always vary, with the ratio or relation between them, which remains always the same."

In 13 Am. and Eng. Ency. Law (2d ed.), 416, it is said: "The very statement of the general rule that reasonable care is required to prevent injuries to others from fire, implies that what is reasonable care must depend upon the circumstances of each particular case. It is, however, inaccurate to say, as many of the cases do, that the degree of care varies with the particular circumstances. It is only reasonable care that is required in any case; but the greater the danger, or the more likely the communication of fire and the ignition of the property of others, the more precautions and the closer vigilance reasonable care requires." As above suggested, cases can be found in which it is stated that the degree of care to be used depends upon the danger, but, as has been observed by this court, it is not every statement of the law as found in an opinion or text-book, however well and accurately put, which can properly be embodied in an instruction. *Garfield* v. *State*, (1881) 74 Ind. 60. The viciousness of the instruction in question lies in its tendency to lead the jury to infer that the legal standard of ordinary care was raised by the circumstances recited, thus making possible the inference that a great but undefined extent of care was required, whereas all that the law exacted was the ordinary care which the situation demanded, or such care as it is to be assumed that an ordinarily prudent man would exercise in the circumstances, were the risk his own.

In this case the acts and omissions which the complaint charged as negligent were various, so that the question of what was ordinary care arose in a number of ways, and we can only conclude, in view of the

misleading character of the instruction under consideration, that prejudicial error has intervened.

Judgment reversed, and a new trial ordered.[1]

DOLPHIN *v.* WORCESTER, &c., R. R. CO.

1905. 189 *Massachusetts*, 270.[2]

ACTION of tort under Revised Laws, chapter 111, section 267, for the death of a passenger on a street railway.

The material portions of the statute are as follows: —

"If a corporation which operates a railroad or a street railway, by reason of its negligence or by reason of the unfitness or gross negligence of its agents or servants while engaged in its business, causes the death of a passenger, or of a person who is in the exercise of due care and who is not a passenger or in the employ of such corporation, it shall be punished by a fine of not less than five hundred nor more than five thousand dollars, which shall be recovered by an indictment," and shall be paid to the executor or administrator, to the use of the widow and children or the next of kin. "Such corporation shall also be liable in damages in the sum of not less than five hundred nor more than five thousand dollars, which shall be assessed with reference to the degree of culpability of the corporation or of its servants or agents, and shall be recovered in an action of tort . . . by the

[1] [From Vol. 6, Albany Law Journal, 314.] The rule, that due diligence is such attention and effort applied to a given case as the ordinary prudent man would put forth under the same circumstances, seems to meet the demands of every conceivable case. . . . The ratio of diligence to circumstances being thus fixed, the two extremes may change to an infinite extent without destroying the ratio, and without giving rise to what we term negligence. The bailee who undertakes the carriage of stone for the paving of a street is held to the rule that he must use such attention and effort as the ordinary prudent man would use under like circumstances.

The bailee, who undertakes to repair a delicate watch, is held to the rule that he must use such attention and effort as the ordinary prudent man would use under the same circumstances. The contract of the watchmaker is the same, relatively, as that of the hod-carrier. Each contracts to provide the reasonable ordinary skill and attention which a man in his position would exercise under like circumstances. The ratio, proportion, or correspondence of diligence to circumstances, of care to surroundings, is fixed and identical. And in determining a question of diligence or negligence in either case, it would be only necessary to apply the same rule to varying circumstances and persons, to demand the same ratio between varying extremes. And it is not too much to assert that all the perplexity and misunderstanding on the subject of diligence and negligence are due to the habit of confounding the specific acts and circumstances, which must always vary, with the ratio or relation between them, which remains always the same. It is true that there *may* be different ratios of effort and attention to the circumstances and to the results desired. A man may contract to furnish the highest skill, the most perfect means and appliances, the most assiduous attention in the accomplishment of a specific end. But, when an individual so contracts, there is the element of *special* or *positive* intention introduced, which takes the case out of the category of diligence, and renders such a contract a special and extraordinary one. The law never requires such a special, positive intention. . . . — ED.

[2] Statement rewritten. Only part of case is given. — ED.

executor or administrator of the deceased for the use of the persons hereinbefore specified in the case of an indictment. . . . But no executor or administrator shall, for the same cause, avail himself of more than one of the remedies given by the provisions of this section."

At the trial the plaintiff requested the following rulings: —

"6. When the duty of exercising the highest degree of care is incumbent upon the defendant, any failure upon the part of its servants to exercise that degree of care is gross negligence.

"7. The term 'gross' in the allegation gross negligence, when used with reference to the degree of care required and not fulfilled, is merely an expletive, when the degree of care required is the very highest.

"8. There are no degrees of negligence."

The plaintiff excepted to the refusal of the judge to give the rulings requested, and to such parts of the charge as were in conflict with them. The defendant had a verdict, and the case is here on these exceptions.

E. J. Melanefy (*J. H. Mathews* with him), for the plaintiff.

C. C. Milton, for the defendant.

LORING, J. . . The judge was right in refusing to give the sixth ruling asked for. A failure to exercise the highest degree of care is slight negligence.

3. The seventh ruling requested was wrong. The term "gross negligence" in a case where the degree of care due is the highest degree of care means that there has been a gross failure to exercise that degree of care.

4. There are degrees of care in cases under R. L. c. 111, § 267, by force of that act.[1]

Exceptions overruled.

KNOWLTON, C. J., IN LANCI *v.* BOSTON ELEVATED RAILWAY.

1907. 197 *Massachusetts*, 32, p. 35.

THE statute on which the plaintiff relies (R. L. chap. 111, sect. 267) recognizes a difference between gross negligence and a mere want of ordinary care. This distinction cannot be disregarded by the courts. *Brennan* v. *Standard Oil Co.*, 187 Mass. 376; *Caswell* v. *Boston Elevated Railway*, 190 Mass. 527; *Evensen* v. *Lexington & Boston Street*

[1] That the wanton and reckless disregard of consequences which makes a defendant liable at common law to a plaintiff not in the exercise of due care is something more than negligence gross in degree, see *Banks* v. *Braman*, 188 Mass. 367.

Railway, 187 Mass. 77, 79. While the gross negligence referred to in this statute does not necessarily include the wanton, reckless, or wilful misconduct which may be the foundation of a criminal prosecution for a wrong inflicted through gross negligence, or of a suit for damages by a trespasser, or by one who was not in the exercise of ordinary care in reference to the conditions which led up to the injury (see *Bjornquist* v. *Boston & Albany Railroad*, 185 Mass. 130, 134, and *Banks* v. *Braman*, 188 Mass. 367), it is something more than the mere lack of ordinary care.

Loring, J., in DIMAURO v. LINWOOD STREET RAILWAY.

1908. 200 *Massachusetts*, 147, pp. 148, 149.

Loring, J. . . . In view of the argument made in the case at bar, we repeat what has been decided: First. It was decided in *Banks* v. *Braman*, 188 Mass. 367, that gross negligence under R. L., chap. 111, sect. 267, is not the same thing as a wanton act which dispenses with proof by a plaintiff of the fact that his negligence was not a contributory cause of the accident. See, in this connection, *Lanci* v. *Boston Elevated Railway*, 197 Mass. 32, 35, and a note to *Dolphin* v. *Worcester Consolidated Street Railway*, 189 Mass. 270, 273, and a note to *Fitzmaurice* v. *New York, New Haven & Hartford Railroad*, 192 Mass. 159, 162. Second. Gross negligence as distinguished from ordinary negligence was created by the act under which this action was brought (R. L., c. 111, s. 267), and exists by force of the provisions of that statute. See *Dolphin* v. *Worcester Consolidated Street Railway*, 189 Mass. 270, 273. Third. In *Dolphin* v. *Worcester Consolidated Street Railway*, *ubi supra*, where the degree of care due was the highest degree of care, the defendant being a carrier and the plaintiff one of its passengers, it was held by the court that gross negligence means a gross failure to exercise the highest degree of care. Where the duty owed by the defendant is to exercise ordinary care, gross negligence has been defined to be "a materially greater degree of negligence than the lack of ordinary care." See *Brennan* v. *Standard Oil Co.*, 187 Mass. 376, 378; *Manning* v. *Conway*, 192 Mass. 122, 125; *Lanci* v. *Boston Elevated Railway*, 197 Mass. 32. In such a case gross negligence may also be defined to be a failure to exercise a slight degree of care.

SMALL *v.* HOWARD.

1880. 128 *Massachusetts*, 131.[1]

Tort against a physician and surgeon for malpractice in dressing and caring for a wound upon the plaintiff's wrist.

The testimony of experts on both sides was, that the wound was a very severe one and required a considerable degree of skill in its treatment. The defendant was a physician and surgeon in Chelmsford, a country town in this Commonwealth, of about twenty-five hundred inhabitants, and had no experience in surgery beyond that usually had by country surgeons. The evidence of the experts was conflicting as to whether the wound was properly treated.

The judge instructed the jury in substance as follows: "A physician or surgeon without a special contract with his patient is never considered as warranting a cure. His contract, as implied by law, is: 1. That he possesses that reasonable degree of learning, skill, and experience which is ordinarily possessed by others of his profession, having regard to the present advanced state of the science of surgery. 2. That he will use reasonable and ordinary care and diligence in the treatment of the case committed to him. 3. That he will use his best judgment in all cases of doubt as to the best course to pursue in his treatment of the case. The defendant, undertaking to practise as a physician and surgeon in a town of comparatively small population, was bound to possess that skill only which physicians and surgeons of ordinary ability and skill, practising in similar localities, with opportunities for no larger experience, ordinarily possess; and he was not bound to possess that high degree of art and skill possessed by eminent surgeons practising in large cities, and making a specialty of the practice of surgery. He is not responsible for want of success, unless it is proved to result from want of ordinary care and attention, and then only to the extent of the injury caused by his want of skill and neglect, not for the whole consequences of the particular original injury or disease. He is not presumed to engage for extraordinary skill or extraordinary care and diligence. He is not responsible for errors in judgment, or mere mistakes in matters of reasonable doubt and uncertainty, provided he exercises ordinary skill and diligence. The rule applicable to this case is not a rule of law applicable to physicians and surgeons alone, nor is it confined to other members of the learned professions, but it is equally applicable to all persons who hold themselves out as possessing special skill in the transaction of the business in which they are engaged. A civil engineer, a watchmaker, mechanic, or blacksmith, for instance, is subject to the same rule of law."

At the plaintiff's request, the jury were instructed that, if the de-

[1] Statement condensed. Argument omitted. — Ed.

fendant had not the requisite skill and experience to treat the wound, he should have temporarily dressed it, if necessary, and recommended the plaintiff to a more skilful surgeon.

The plaintiff objected to the instructions given, only in so far as the degree of skill, learning, and experience required of the defendant was concerned, contending that a higher degree thereof was required of the defendant than above laid down; and relied entirely on the defendant's lack of skill, learning, and experience.

The plaintiff also asked the judge to instruct the jury that "it is incumbent upon the defendant to possess the degree of skill and learning possessed by well-educated surgeons"; and "that the average degree of skill and learning possessed by the surgeons of this Commonwealth is not necessarily all the skill and learning which it is incumbent on the defendant to possess." The judge declined to give these instructions.

Verdict for defendant.

G. A. Torrey, for the plaintiff.

H. B. Staples, for the defendant.

AMES, J. The complaint of the plaintiff is, that, in the treatment of the wound under which he was suffering, the defendant did not furnish that degree of skill, learning, and experience which was required of him, and which, in undertaking the case, he impliedly bound himself to furnish. It is not contended that he engaged to furnish extraordinary skill, or that he warranted a cure, but that in undertaking the case he held himself out as being a man of reasonable and ordinary skill and experience in his profession as a surgeon. His contract, as implied by law, is, so far as this point is concerned, that he possesses that reasonable degree of learning, skill, and experience which is ordinarily possessed by others of his profession. *Leighton* v. *Sargent*, 7 Foster, 460. It must be the ordinary skill, learning, and experience of the profession generally. *Wilmot* v. *Howard*, 39 Vt. 447. And, in judging of this degree of skill in any given case, regard is to be had to the advanced state of the profession at the time. *McCandless* v. *McWha*, 22 Penn. St. 261.

The instructions which were given upon this subject were in conformity to these principles, and the jury were distinctly told, that, in their estimate of the reasonable skill ordinarily possessed by others in the profession, regard was to be had to the present advanced state of the science of surgery. The plaintiff, however, complains that the rule, as given by the presiding judge, lowers the standard of learning and skill required for the practice of medicine and surgery, by including in the expression, "others in the profession," all the mountebanks, ignorant pretenders, and impostors who undertake the practice of medicine and surgery as their ordinary calling. The judge in his charge was speaking of the "profession," of the "advanced state of the science of surgery," and of the "learned professions." These terms clearly imply study, education, and special preparation. They

have no application to persons who, without education, and nothing to guide them but some pretended inspiration of their own, usurp the name and seek to assume the character of physicians and surgeons. The instruction upon this general subject was safer and more accurate than that requested by the plaintiff. "The degree of learning, skill, and experience ordinarily possessed by the profession," is a more distinct and less speculative and misleading form of expression than "the skill and learning possessed by well-educated surgeons." The instructions requested by the plaintiff were therefore properly refused. The jury could hardly have supposed that the skill required of the defendant was merely the average skill of all practitioners, educated and uneducated, permanent and occasional, regulars and interlopers alike.

One other point remains to be considered. It is a matter of common knowledge that a physician in a small country village does not usually make a specialty of surgery, and, however well informed he may be in the theory of all parts of his profession, he would, generally speaking, be but seldom called upon as a surgeon to perform difficult operations. He would have but few opportunities of observation and practice in that line such as public hospitals or large cities would afford. The defendant was applied to, being the practitioner in a small village, and we think it was correct to rule that "he was bound to possess that skill only which physicians and surgeons of ordinary ability and skill, practising in similar localities, with opportunities for no larger experience, ordinarily possess; and he was not bound to possess that high degree of art and skill possessed by eminent surgeons practising in large cities, and making a specialty of the practice of surgery."

At the plaintiff's request, the court ruled in substance that, if the case was one which the defendant was not qualified to undertake, he should have referred the plaintiff to a more skilful surgeon. The remark of the presiding judge, that the rule as to ordinary skill applied equally to mechanical operations and employments not included within the range of the learned professions was merely an illustration, and could not have misled the jury. No wrong was done to the plaintiff in the trial, and the

Exceptions are overruled.

McCANDLESS *v.* McWHA.

1853. 22 *Pennsylvania State*, 261.[1]

WOODWARD, J. This was an action on the case by the defendant in error against the plaintiff in error, a respectable physician and surgeon, for malpractice in setting a broken leg of the plaintiff; and the only question of any importance presented for our consideration is, whether the court erred in charging "that the defendant was bound to bring to his aid the skill necessary for a surgeon to set the leg so as to make it straight and of equal length with the other, when healed; and if he did not, he was accountable in damages, just as a stone-mason or bricklayer would be in building a wall of poor materials, and the wall fell down, or if they built a chimney and it should smoke by reason of a want of skill in its construction."

It is impossible to sustain this proposition. It is not true in the abstract, and if it were, it was inapplicable to the circumstances of the case under investigation. The implied contract of a physician or surgeon is not to cure, — to restore a fractured limb to its natural perfectness, — but to treat the case with diligence and skill. The fracture may be so complicated that no skill vouchsafed to man can restore original straightness and length; or the patient may, by wilful disregard of the surgeon's directions, impair the effect of the best conceived measures. He deals not with insensate matter like the stone-mason or bricklayer, who can choose their materials and adjust them according to mathematical lines; but he has a suffering human being to treat, a nervous system to tranquillize, and a *will* to regulate and control. The evidence before us makes this strong distinction between surgery and masonry, and shows how the judge's inapt illustration was calculated to lead away the jury from the true point of the case.

. . . . . .

We have stated the rule to be reasonable skill and diligence; by which we mean such as thoroughly educated surgeons ordinarily employ. If more than this is expected, it must be expressly stipulated for; but this much every patient has a right to demand in virtue of the implied contract which results from intrusting his case to a person holding himself out to the world as qualified to practise this important profession. If a patient applies to a man of *different occupation or employment* for his assistance, who either does not exert his skill or administers improper remedies to the best of his ability, such person is not liable in damages; but if he applies to a SURGEON and he treats him improperly, he is liable to an action even though he undertook *gratis* to attend the patient, because his situation implies skill in surgery. Per Heath, J., in *Shiels* v. *Blackburn*, 1 Hen. Blac.

[1] Statement and arguments omitted; also a large part of the opinions. — ED.

161; *Seare* v. *Prentice*, 8 East. 348. The principle is contained in the pithy saying of Fitzherbert that "it is the duty of every artificer to exercise his art rightly, and truly, as he ought." This is peculiarly the duty of professional practitioners, to whom the highest interests of man are often necessarily intrusted. The law has no allowance for quackery. It demands *qualification* in the profession practised, — not extraordinary skill such as belongs only to few men of rare genius and endowments, but that degree which ordinarily characterizes the profession. And in judging of this degree of skill, in a given case, regard is to be had to the advanced state of the profession at the time. Discoveries in the natural sciences for the last half-century have exerted a sensible influence on all the learned professions, but especially on that of medicine, whose circle of truths has been relatively much enlarged. And besides, there has been a positive progress in that profession resulting from the studies, the experiments, and the diversified practice of its professors. The patient is entitled to the benefit of these increased lights. The physician or surgeon who assumes to exercise the healing art, is bound to be up to the improvements of the day. The standard of ordinary skill is on the advance; and he who would not be found wanting, must apply himself with all diligence to the most accredited sources of knowledge.

. . . . . .

Judgment for plaintiff reversed. Venire de novo awarded.

McNEVINS *v.* LOWE.

1866. 40 *Illinois*, 209.

Lawrence, J. This was an action brought against the appellant for malpractice as a surgeon and physician. In the third and fourth instructions for the plaintiff, the court told the jury that the defendant, if he held himself out as a physician, was liable for whatever damage may have accrued to the plaintiff by reason of *any* want of care or skill on his part whether he charged fees or not. This states the responsibility of a physician too strongly, as it requires the highest degree of care and skill, whereas only reasonable care and skill are necessary. As to the payment of fees the instruction is unobjectionable. If a person holds himself out to the public as a physician he must be held to ordinary care and skill in every case of which he assumes the charge, whether in the particular case he has received fees or not. But if he does not profess to be a physician nor to practice as such, and is merely asked his advice as a friend or neighbor, he does not incur any professional responsibility. The case of *Ritchey* v. *West*, 23 Ill. 385, is to

be understood in this sense. The judgment must be reversed because the instruction required the highest degree of care and skill.

Judgment reversed.[1]

[1] The general duty of diligence includes the particular duty of competence in cases where the matter taken in hand is of a sort requiring more than the knowledge or ability which any prudent man may be expected to have. If a man will handle a ship, he is bound to have the ordinary competence of a seaman. This is not an exception or extension but a necessary application of the general rule. For a reasonable man will know the bounds of his competence, and will not generally intermeddle where he is not competent. If, however, in emergency, and to avoid imminent risk, the conduct of something generally intrusted to skilled persons is taken by an unskilled person, no more is required of him than to make a prudent and reasonable use of such skill as he actually has. (Condensed from Pollock on Torts, 2d ed., pp. 380, 24, 25, 26.)

Compare Clerk and Lindsell on Torts, 2d ed., 393. — Ed.

CHAPTER VI.

PROOF OF NEGLIGENCE.[1]

SECTION I.

Respective Functions of Judge and Jury.

METROPOLITAN R. R. CO., APPELLANTS, *v.* JACKSON, RESPONDENT.

1877. *Law Reports*, 3 *Appeal Cases*, 193.[2]

THE LORD CHANCELLOR (Lord Cairns) : —

My Lords, in this case an action was brought by the respondent against the Metropolitan Railway Company for negligence in not carrying the respondent safely as a passeuger on the railway, and for injuring his thumb by the act of one of the appellants' servants in suddenly and violently closing the door of the railway carriage.

The question is, Was there at the trial any evidence of this negligence which ought to have been left to the jury? The Court of Common Pleas, consisting of Lord Coleridge, Mr. Justice Brett, and Mr. Justice Grove, were of opinion that there was such evidence. The Court of Appeal was equally divided; the Lord Chief Justice and Lord Justice of Appeal Amphlett holding that there was evidence, the Lord Chief Baron and Lord Justice of Appeal Bramwell holding that there was not.

The facts of the case are very short. The respondent in the evening of the 18th of July, 1872, took a third-class ticket from Moorgate Street to Westbourne Park, and got into a third-class compartment; the compartment was gradually filled up, and when it left King's Cross all the seats were occupied. At Gower Street Station three persons got in and were obliged to stand up. There was no evidence to show that the attention of the company's servants was drawn to the fact of an extra number being in the compartment; but there was evidence that the respondent remonstrated at their getting in with the persons so getting in, and a witness who travelled in the same compartment stated that he did not see a guard or porter at Gower Street.

[1] The special topics dealt with in this chapter do not concern the substantive law of tort. They fall rather under the heads of procedure and evidence. But, without some knowledge on these particular subjects, it is difficult for a student to understand the real ground of decision in some of the cases which are cited as bearing on the general subject of negligence. — ED.

[2] Statement, arguments, and parts of opinions omitted. — ED.

At Portland Road, the next station, the three extra passengers still remained standing up in the compartment. The door of the compartment was opened and then shut; but there was no evidence to show by whom either act was done. Just as the train was starting from Portland Road there was a rush, and the door of the compartment was opened a second time by persons trying to get in. The respondent, who had up to this time kept his seat, partly rose and held up his hand to prevent any more passengers coming in. After the train had moved, a porter pushed away the people who were trying to get in, and slammed the door to, just as the train was entering the tunnel. At that very moment the respondent, by the motion of the train, fell forward and put his hand upon one of the hinges of the carriage door to save himself, and at that moment, by the door being slammed to, the respondent's thumb was caught and injured.

The case as to negligence having been left to the jury, the jury found a verdict for the respondent with £50 damages. There was not, at your lordships' bar, any serious controversy as to the principles applicable to a case of this description. The judge has a certain duty to discharge, and the jurors have another and a different duty. (The judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred.) It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever. To take the instance of actions against railway companies: a company might be unpopular, unpunctual, and irregular in its service; badly equipped as to its staff; unaccommodating to the public; notorious, perhaps, for accidents occurring on the line; and when an action was brought for the consequences of an accident, jurors, if left to themselves, might, upon evidence of general carelessness, find a verdict against the company in a case where the company was really blameless. It may be said that this would be set right by an application to the court in banc, on the ground that the verdict was against evidence; but it is to be observed that such an application, even if successful, would only result in a new trial; and on a second trial, and even on subsequent trials, the same thing might happen again.

In the present case I am bound to say that I do not find any evidence from which, in my opinion, negligence could reasonably be inferred. The negligence must in some way connect itself, or be con-

nected by evidence, with the accident. It must be, if I might invent an expression founded upon a phrase in the civil law, *incuria dans locum injuriae.* In the present case there was no doubt negligence in the company's servants, in allowing more passengers than the proper number to get in at the Gower Street Station; and it may also have been negligence if they saw these supernumerary passengers, or if they ought to have seen them, at Portland Road, not to have then removed them; but there is nothing, in my opinion, in this negligence which connects itself with the accident that took place. If, when the train was leaving Portland Road, the overcrowding had any effect on the movements of the respondent; if it had any effect on the particular portion of the carriage where he was sitting, if it made him less a master of his actions when he stood up or when he fell forward, this ought to have been made matter of evidence; but no evidence of the kind was given.

As regards what took place at Portland Road, I am equally unable to see any evidence of negligence connected with the accident, or indeed of any negligence whatever. The officials cannot, in my opinion, be held bound to prevent intending passengers on the platform opening a carriage door with a view of looking or getting into the carriage. They are bound to have a staff which would be able to prevent such persons getting in where the carriage was already full, and this staff they had, for the case finds that the porter pushed away the persons who were attempting to get in. So also with regard to shutting the door; these persons had opened the door, and thereupon it was not only proper but necessary that the door should be shut by the porter; and, as the train was on the point of passing into a tunnel, he could not shut it otherwise than quickly or in this sense violently.

[Remainder of opinion omitted.]

Lord Blackburn: —

My Lords, I also am of opinion that in this case the judgment should be reversed, and a nonsuit entered. On a trial by jury it is, I conceive, undoubted that the facts are for the jury, and the law for the judge. It is not, however, in many cases practicable completely to sever the law from the facts.

But I think it has always been considered a question of law to be determined by the judge, subject, of course, to review, whether there is evidence which, if it is believed, and the counter-evidence, if any, not believed, would establish the facts in controversy. It is for the jury to say whether and how far the evidence is to be believed. And if the facts, as to which evidence is given, are such that from them a farther inference of fact may legitimately be drawn, it is for the jury to say whether that inference is to be drawn or not. But it is for the judge to determine, subject to review, as a matter of law whether from those facts that farther inference may legitimately be drawn.

My Lords, in delivering the considered judgment of the Exchequer Chamber in *Ryder* v. *Wombwell*,[1] Willes, J., says: "Such a question is one of mixed law and fact; in so far as it is a question of fact, it must be determined by a jury, subject no doubt to the control of the court, who may set aside the verdict, and submit the question to the decision of another jury; but there is in every case a preliminary question, which is one of law, viz., whether there is any evidence on which the jury could properly find the verdict for the party on whom the *onus* of proof lies. If there is not, the judge ought to withdraw the question from the jury, and direct a nonsuit if the *onus* is on the plaintiff, or direct a verdict for the plaintiff if the *onus* is on the defendant. It was formerly considered necessary in all cases to leave the question to the jury, if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge (subject, of course, to review), is, as is stated by Maule, J., in *Jewell* v. *Parr*,[2] 'not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established.'"

He afterwards observes,[3] very truly in my opinion, "There is no doubt a possibility in all cases where the judges have to determine whether there is evidence on which the jury may reasonably find a fact, that the judges may differ in opinion, and it is possible that the majority may be wrong. Indeed, whenever a decision of the court below on such a point is reversed, the majority must have been so either in the court above or the court below. This is an infirmity which must affect all tribunals."

I quite agree that this is so, and it is an evil. But I think it a far slighter evil than it would be to leave in the hands of the jury a power which might be exercised in the most arbitrary manner.

[Remainder of opinion omitted.]

[The concurring opinions of LORD O'HAGAN and LORD GORDON are omitted.]

Judgment given for the plaintiff in the court below reversed, and a nonsuit to be entered.[4]

[1] Law Rep. 4 Ex. 38.
[2] 13 C. B. 916.
[3] Law Rep. 4 Ex. 42.

[4] A much controverted question as to the respective functions of the judge and the jury arises in the following case: —

A man, without looking or listening, attempts to cross the track of a steam railway, and is hit by a negligently managed engine. He sues. Defendant says plaintiff is barred by contributory negligence. Should the judge rule that crossing without looking and listening (or crossing without stopping, looking, and listening) is, as matter of law, negligent conduct? Or should the judge tell the jury that such conduct is evidence from which negligence *may be* inferred, and that it is for them to say whether they *do* infer it? As to this, there is a conflict of authority. See discussion and collected cases in 3 Elliott on Railroads, 1st ed., section 1167; 2 Thompson, Commentaries on the Law of Negligence, Chap. 52, Article 2, sections 1637–1661, especially sections 1640, 1649, 1650, 1653; 23 Am. & Eng. Encycl. Law, 2d ed., 765–767; Beach on Contributory Negligence, 3d ed., sections 181, 182. — ED.

ELLSWORTH, J., IN DERWORT *v.* LOOMER.

1851. 21 *Connecticut*, 245, p. 252.

ELLSWORTH, J. This is a motion for a new trial, because the verdict is against evidence.

It has been argued before us, as if two issues had been tried to the jury; one upon the sufficiency of the evidence to support the declaration, and the other, the sufficiency of the evidence to support the plea of accord and satisfaction, and release.

We are of opinion the jury erred, in rendering their verdict for the defendant, on either ground of defence, and so obviously erred, that we shall allow the plaintiffs to present their cause for trial, to another jury.

The court is reluctant, at all times, to set aside the verdict of a jury, for the cause that they have erred in weighing evidence; nor do the court feel at liberty to do this, where the jury have passed upon a mere question of fact, unless we see that the verdict is so palpably and manifestly against evidence, as that it is apparent their minds were not open to reason and conviction, or that an improper influence, from some cause or other, was brought to bear on their deliberations. We do not say that this is that case; nor that we would now interpose and grant a new trial, did we consider the verdict as involving matters of fact, only. But it involves more. We think the jury must have proceeded upon false notions of law; certainly they did, if they found there had been no fault or negligence, on the part of the defendant, or his agent. Neglect of duty, or legal negligence, is not in all cases, a pure question of fact for the jury, but is often mixed up with principles of law, so that negligence becomes a conclusion of law rather than of fact; or more properly, it becomes a rule of responsibility, which courts, through the verdict, aim to have applied faithfully and uniformly. Jurors not unfrequently entertain singular notions of the accountability of common carriers and stage proprietors; and they will, sometimes, pertinaciously follow out those notions, notwithstanding the instructions and efforts of the court to the contrary.

SANFORD, J., IN WATERS *v.* BRISTOL.

1857. 26 *Connecticut*, 398, pp. 404, 405.

SANFORD, J. The authority of the court to grant a new trial for a verdict against evidence is undoubted, and its exercise sometimes indispensable to the due administration of justice, but it is a power to be invoked only when manifest injustice has been done by the ver-

dict, and when the wrong is so plain and palpable as to exclude all reasonable doubt of its existence; indeed, so obvious as clearly to denote that some mistake has been made in the application of legal principles, or to justify the suspicion of corruption, prejudice, or partiality in the jury. This is the settled rule, sanctioned and illustrated by the whole current of our decisions on the subject. We think it a wise and salutary rule, and feel no inclination to abrogate or depart from it. *Johnson* v. *Scribner*, 6 Conn. 186; *Yale* v. *Yale*, 13 Id. 185; *Bulkley* v. *Waterman*, Id. 328; *Clark* v. *Whitaker*, 19 Id. 319; *Babcock* v. *Porter*, 20 Id. 570. The due application of this rule requires that this motion should be denied.

CLARK *v.* JENKINS.

1894. 162 *Massachusetts*, 397.[1]

Tort, under St. 1887, c. 270, for personal injuries occasioned to the plaintiff while in the defendants' employ.

At the trial in the Superior Court, before *Bishop*, J., the defendants moved, at the close of the plaintiff's case, that the jury be directed to find a verdict for the defendants, on the ground that there was not sufficient evidence to sustain a verdict for the plaintiff, which motion was denied. At the close of the defendants' case they renewed the motion, which was again denied. The jury found for the plaintiff, and the defendants moved that the verdict be set aside for the reasons that it was against the law, and against the evidence and the weight of the evidence.

At the hearing on this motion the records of the Superior Court in this case were produced by the plaintiff, from which it appeared that the verdict found by the jury in this trial was the third verdict found for the plaintiff in this action, and that the preceding verdicts had been set aside upon like motions. The plaintiff asked the court to rule "that under these circumstances it had no authority to set the verdict aside, either on the ground that it was against the evidence or the weight of evidence, and that it would be an abuse of discretion on the part of the court to set it aside on either of those grounds."

The judge declined to give the ruling requested, and directed that the verdict be set aside upon the ground that it was against the evidence and the weight of the evidence; and the plaintiff alleged exceptions.

W. J. Coughlan, for the plaintiff.

A. Lord, for the defendants, was stopped by the court.

Allen, J. The cases cited for the plaintiff show that it is sometimes said to be the duty of the court to direct the jury to return a verdict

[1] Citations of counsel omitted. — Ed.

for the defendant, in cases where the whole evidence is insufficient to support a verdict for the plaintiff. The rule as declared by the Supreme Court of the United States is, that in such a case "the court is not bound to submit the case to the jury, but may direct a verdict for the defendant." *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478. *Schofield* v. *Chicago, Milwaukee, & St. Paul Railway*, 114 U. S. 615. In the present case, the court may have thought it expedient to leave the case to the jury without such direction, in the expectation that they would find for the defendants, and thus save any further question; or for the moment it may have seemed doubtful whether there was not some slight evidence entitling the plaintiff to go to the jury. However this may have been, the plaintiff has not referred us to any case where it has been held that the omission to give such direction, on motion of the defendant, will debar the court from afterwards setting aside a verdict for the plaintiff, as against the evidence. No such limitation of authority is found in Pub. Sts. c. 153, § 6, providing that "the courts may at any time before judgment in a civil action set aside the verdict and order a new trial for any cause for which a new trial may by law be granted." We have no doubt of the legal authority of the court to set aside the verdict, although the defendants' motion to direct the jury to find a verdict for the defendants had been denied.

In this Commonwealth, there is no rule of law limiting the number of times that a judge may set aside a verdict as against the evidence. On the other hand, it has been recognized that in an extraordinary case the court may set aside any number of verdicts that might be returned. *Coffin* v. *Phenix Ins. Co.*, 15 Pick. 291, 295. *Denny* v. *Williams*, 5 Allen, 1, 5. *Brooks* v. *Somerville*, 106 Mass. 271, 275. See also *Davies* v. *Roper*, 2 Jur. (N. S.) 167; *State* v. *Horner*, 86 Mo. 71; *Wolbrecht* v. *Baumgarten*, 26 Ill. 291. The fact that three successive verdicts for the plaintiff have been returned does not of itself make it the legal duty of the court to allow the last verdict to stand if unsupported by sufficient evidence.

No other reason except those above referred to has been assigned for questioning the action of the court in setting aside the verdict for the plaintiff, and neither of these shows that the court exceeded its legal authority.

Exceptions overruled.

SECTION II.

Res Ipsa Loquitur.

KEARNEY *v.* LONDON, &c., RAILWAY COMPANY.

1870. *Law Reports*, 5 *Queen's Bench*, 411.[1]

DECLARATION, that the defendants were possessed of a bridge over a certain public highway, and it became their duty to maintain and keep in repair the bridge, so that it should not be injurious to any person passing under it; yet the defendants so negligently maintained the bridge, that while the plaintiff was lawfully passing under the bridge a portion of the materials of the bridge fell down and injured the plaintiff.

Plea: Not guilty. Issue joined.

At the trial before Hannen, J., at the sittings in Middlesex after Michaelmas Term, 1869, it appeared, according to the plaintiff's evidence, that the plaintiff, on the 20th of January, 1869, was passing along the Blue Anchor Road, Bermondsey, under the railway bridge of the defendants, when a brick fell and injured him on the shoulder. A train had passed just previously, but whether it was a train of the defendants', or of another company (whose trains also pass over the bridge), did not appear. The bridge had been built three years, and is an iron girder bridge resting on iron piers, on one side, and on a perpendicular brick wall with pilasters, on the other, and the brick fell from the top of one of the pilasters, where one of the girders rested on the pilaster.

The defendants called no witnesses,[2] but rested their defence on there being no evidence of negligence in the defendants; and also on the ground that the injury to the plaintiff's shoulder was not really caused by the falling of the brick.

As to the evidence of negligence, the learned judge told the jury that if they thought the bare circumstance of a brick falling out was not evidence of negligence, they would find for the defendants; if they thought otherwise, for the plaintiff; and the court would determine whether there was legal evidence of negligence or not, as to which he should reserve leave to the defendants to move.

The jury found a verdict for the plaintiff for 25*l.*

A rule was obtained to enter a nonsuit, on the ground that there was no evidence of negligence to leave to the jury.

[1] Arguments omitted; also the concurring opinion of LUSH, J., and the dissenting opinion of HANNEN, J. — ED.

[2] But see *Law Reports*, 6 Queen's Bench, pp. 760-761. — ED.

Murphy showed cause.

Lopes, Q. C., and *Joyce*, in support of the rule.

COCKBURN, C. J. As we have had the whole matter carefully brought before us, with the cases bearing upon the subject, I think we should gain nothing by taking further time to consider it; and, therefore, although I regret to say we are not unanimous upon the point, I think it is better to dispose of the case at once.

My own opinion is, that this is a case to which the principle res ipsa loquitur is applicable, though it is certainly as weak a case as can well be conceived in which that maxim could be taken to apply. But I think the maxim is applicable; and my reason for saying so is this. The company who have constructed this bridge were bound to construct it in a proper manner, and to use all reasonable care and diligence in keeping it in such a state of repair that no damage from its defective condition should occur to those who passed under it, the public having a right to pass under it. Now we have the fact that a brick falls out of this structure, and injures the plaintiff. The proximate cause appears to have been the looseness of the brick, and the vibration of a train passing over the bridge acting upon the defective condition of the brick. It is clear, therefore, that the structure in reference to this brick was out of repair. It is clear that it was incumbent on the defendants to use reasonable care and diligence, and I think the brick being loose affords, prima facie, a presumption that they had not used reasonable care and diligence. It is true that it is possible that, from changes in the temperature, a brick might get into the condition in which this brickwork appears to have been from causes operating so speedily as to prevent the possibility of any diligence and care applied to such a purpose intervening in due time, so as to prevent an accident. But inasmuch as our experience of these things is, that bricks do not fall out when brickwork is kept in a proper state of repair, I think where an accident of this sort happens, the presumption is that it is not the frost of a single night, or of many nights, that would cause such a change in the state of this brickwork as that a brick would fall out in this way; and it must be presumed that there was not that inspection and that care on the part of the defendants which it was their duty to apply. On the other hand, I admit most readily that a very little evidence would have sufficed to rebut the presumption which arises from the manifestly defective state of this brickwork. It might have been shown that many causes, over which the defendants had no control, might cause this defect in so short a time as that it could not be reasonably expected that they should have inspected it in the interval. They might, if they were able, have shown that they had inspected the bridge continually, or that such a state of things could not be anticipated, and had never been heard of or known before. Anything which tended to rebut the presumption arising from an accident caused by the defective condition of the brickwork, which it was their duty to keep in a proper condition of repair, even if such evidence were but slight, might have

sufficed; but the defendants chose to leave it on the naked state of facts proved by the plaintiff. Upon that naked state of facts it is not unimportant to see what might have been the cause of the defective condition of this brickwork. We have the fact, the datum, that the brickwork was in a defective condition, and we have it admitted that it was the defendant's duty to use reasonable care and diligence to keep it in a proper condition. Where it is the duty of persons to do their best to keep premises, or a structure, of whatever kind it may be, in a proper condition, and we find it out of condition, and an accident happens therefrom, it is incumbent upon them to show that they used that reasonable care and diligence which they were bound to use, and the absence of which it seems to me may fairly be presumed from the fact that there was the defect from which the accident has arisen. Therefore, there was some evidence to go to the jury, however slight it may have been, of this accident having arisen from the negligence of the defendants; and it was incumbent on the defendants to give evidence rebutting the inference arising from the undisputed facts; that they have not done, and I therefore think this rule must be discharged.)

Lush, J., delivered a concurring opinion. Hannen, J., delivered a dissenting opinion. *Rule discharged.*

Affirmed in the Exchequer Chamber; L. R. 6 Qu. B. 759.

BENEDICK *v.* POTTS.

1898. 88 *Maryland*, 52.[1]

Appeal from Circuit Court, where judgment was entered on a verdict for defendant, ordered by the court.

Defendant owned and operated, at a pleasure resort, a mimic railway, which was a wooden structure. Open cars were hoisted up an incline to the highest point of the railway, and were then run by gravity down and around a circular track to the ground. The length of the spiral track was about two thousand feet, and it made three circuits before reaching the ground. At about the middle of the last circle nearest the ground, the cars passed through a tunnel which was part of the structure. This tunnel was one hundred and fifty feet long, and completely incased that portion of the track, and hid the cars and their occupants from all observation when passing through it. The cars were provided with handles for the occupants to grasp during the rapid descent. Plaintiff was the sole occupant of the rear seat in one of the cars. The car was started and made the descent; but when it reached the ground at the end of the track the plaintiff was not in it, though as it entered the tunnel he was seen to be upon it. Search

[1] Statement abridged. — Ed.

was at once made, and he was found inside the tunnel, in an unconscious condition, with a wound upon his head. After several days he was restored to consciousness. For the damages thus sustained, this suit was brought.

The car did not leave the track, no part of it was shown to be out of repair, the track was not defective, and no explanation is given in the record as to what caused the injury. The plaintiff distinctly stated that he made no effort to rise as he passed through the tunnel, and that he did not relax his grasp on the sides of the car. He was in the car when it passed into the tunnel. He was not in it when it emerged. How he got off was not shown.

Upon this state of facts the trial court instructed the jury that there was no legally sufficient evidence to show that the defendant had been guilty of negligence; and the verdict and judgment were accordingly entered for defendant. Plaintiff brought up the record by appeal.

Albert Constable (*John B. Brown* and *Harrison W. Vickers* with him), for appellant.

Hope H. Barroll, for appellee.

McSherry, C. J. This is an action to recover damages for a personal injury, and the single question which the record presents is whether there was legally sufficient evidence of the defendant's imputed negligence to carry the case to the jury. The facts are few and simple. [The learned judge then stated the facts.]

It is a perfectly well-settled principle that to entitle a plaintiff to recover in an action of this kind he must show not only that he has sustained an injury but that the defendant has been guilty of some negligence which produced that particular injury. The negligence alleged and the injury sued for must bear the relation of cause and effect. The concurrence of both and the *nexus* between them must exist to constitute a cause of action. As an injury may occur from causes other than the negligence of the party sued, it is obvious that before a liability on account of that injury can be fastened upon a particular individual, it must be shown, or there must be evideuce legally tending to show, that he is responsible for it; that is, that he has been guilty of the negligence that produced or occasioned the injury. In no instance can the bare fact that an injury has happened, of itself and divorced from all the surrounding circumstances, justify the inference that the injury was caused by negligence. It is true that direct proof of negligence is not necessary. Like any other fact, negligence may be established by the proof of circumstances from which its existence may be inferred. But this inference must, after all, be a legitimate inference and not a mere speculation or conjecture. There must be a logical relation and connection between the circumstances proved and the conclusion sought to be adduced from them. This principle is never departed from, and in the very nature of things it never can be disregarded. There are instances in which the circumstances surrounding an occurrence and giving a character to it are

held, if unexplained, to indicate the antecedent or coincident existence of negligence as the efficient cause of an injury complained of. These are the instances where the doctrine of *res ipsa loquitur* is applied. This phrase, which literally translated means that "the thing speaks for itself," is merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as the cause of that accident; and the doctrine which it embodies, though correct enough in itself, may be said to be applicable to two classes of cases only, viz., first, "when the relation of carrier and passenger exists and the accident arises from some abnormal condition in the department of actual transportation; second, where the injury arises from some condition or event that is in its very nature so obviously destructive of the safety of person or property and is so tortious in its quality as, in the first instance at least, to permit no inference save that of negligence on the part of the person in the control of the injurious agency." Thomas on Neg. 574. But it is obvious that in both instances more than the mere isolated, single, segregated fact that an injury has happened must be known. The injury, without more, does not necessarily speak or indicate the *cause* of that injury — it is colorless; but the act that produced the injury being made apparent may, in the instances indicated, furnish the ground for a presumption that negligence set that act in motion. The maxim does not go to the extent of implying that you may from the mere fact of an injury infer what physical act produced that injury; but it means that when the physical act has been shown or is apparent and is not explained by the defendant, the conclusion that negligence superinduced it may be drawn as a legitimate deduction of fact. It permits an inference that the known act which produced the injury was a negligent act, but it does not permit an inference as to what act did produce the injury. Negligence manifestly cannot be predicated of any act until you know what the act is. Until you know *what* did occasion an injury, you cannot say that the defendant was guilty of some negligence that produced that injury. There is, therefore, a difference between inferring as a conclusion of fact *what* it was that did the injury; and inferring from a known or proven act occasioning the injury that there was negligence in the act that did produce the injury. To the first category the maxim *res ipsa loquitur* has no application; it is confined, when applicable at all, solely to the second. In no case where the thing which occasioned the injury is unknown has it ever been held that the maxim applies; because when the thing which produced the injury is unknown it cannot be said to speak or to indicate the existence of causative negligence. In all the cases, whether the relation of carrier and passenger existed or not, the injury alone furnished no evidence of negligence — something more was required to be shown. For instance: In *Penn. R. R. Co.* v. *MacKinney*, 124 P. St. 462, it was said: "A passenger's leg is broken, while on his passage, in a railroad car.

this mere fact is no evidence of negligence on the part of the carrier until something further be shown. If the witness who swears to the injury testifies also that it was caused by a crash in a collision with another train of cars belonging to the same carrier, the presumption of negligence immediately arises; not, however, from the fact that the leg was broken, but from the circumstances attending the fact." And so in *Byrne* v. *Boadle*, 2 Hurl. & Colt. 728, there was proof not only of an injury but there was evidence to show *how* the injury happened, and the presumption of negligence was applied, not because of there being an injury, but because of the way or manner in which the injury was produced. And in *Howser's case*, 80 Md. 146, the injury was caused by cross-ties falling from a moving train upon the plaintiff who was walking by the side of the track, and the presumption of negligence was allowed, not as an inference deducible from the injury itself, but as a conclusion resulting from the method in which and the instrumentality by which the injury had been occasioned. In the recent case of *Consolidated Traction Co.* v. *Thalheimer*, Court of Errors and Appeals, N. J. 2 Amer. Neg. Rep. 196, it appeared that the plaintiff was a passenger of the appellant, and, having been notified by the conductor that the car was approaching the point where she desired to alight, got up from her seat and walked to the door while the car was in motion, and, while going through the doorway, she was thrown into the street by a sudden lurch and thus injured. The court said: "At all events, the fact that such a lurch or jerk occurred, as would have been unlikely to occur if proper care had been exercised, brings the case within the maxim *res ipsa loquitur*." The inference of negligence arose not from the injury to the passenger, but from the *act* that caused the injury. In *B. & O. R. R.* v. *Worthington*, 21 Md. 275, the train was derailed in consequence of an open switch, and it was held that the injury thus inflicted on the passenger was presumptive evidence of negligence — not that the mere injury raised such a presumption, but that the injury caused in the way and under the circumstances shown indicated actionable negligence unless satisfactorily explained.

Whether, therefore, there be a contractual relation between the parties or not, there must be proof of negligence or proof of some circumstances from which negligence may be inferred, before an action can be sustained. And whether you characterize that inference an ordinary presumption of fact, or say of the act that caused the injury, the thing speaks for itself, you assert merely a rebuttable conclusion deduced from known and obvious premises. It follows, of course, that when the *act* that caused the injury is wholly unknown or undisclosed, it is simply and essentially impossible to affirm that there was a negligent act; and neither the doctrine of *res ipsa loquitur* nor any other principle of presumption can be invoked to fasten a liability upon the party charged with having by negligence caused the injury for the infliction of which a suit has been brought.

Now, in the case at bar there is no evidence that the car on the track was out of repair. The car went safely to its destination, carrying the other occupants. There is no evidence that the roof of the tunnel struck the appellant, or that the fact that a small part of the central plank of the tunnel roof had been slabbed off had the most remote connection with the accident. It is a case presenting not a single circumstance showing *how* or by what agency the injury occurred, and in which, with nothing but the isolated fact of the injury having happened, being proved, it is insisted that the jury shall be allowed to speculate as to the cause that produced it, and then to *infer* from the cause thus assumed but not established, that there was actionable negligence. It is not an attempt to infer negligence from an apparent cause, but to infer the cause of the injury from the naked fact of injury, and then to superadd the further inference that this inferred cause proceeded from negligence. If in *Howser's case, supra,* there had been no other evidence than the mere *fact* of an injury, it cannot be pretended that the jury would have been allowed to speculate as to *how* the injury had occurred.

The appellant was on the car when it entered the tunnel; he was not on the car when it emerged, but was found in an unconscious state in the tunnel. There was no defect in or abnormal condition affecting the means of actual transportation. The other occupants of the car passed safely through. What caused the appellant to be out of the car is a matter of pure conjecture. No one has explained or attempted to explain how he got where he was found. Indeed, the two persons who occupied the front seat were ignorant of the appellant's absence from the car until it had reached its destination, and the appellant himself distinctly testified that he did not relax his hold to the car and did not attempt to rise, but lowered his head as he entered the tunnel. All that is certain is, that he was injured in *some* way and he asks that the jury may be allowed, in the absence of all explanatory evidence, to infer that some act of a negligent character for which the appellee is responsible, caused the injury sustained by the appellant. No case has gone to that extent and no known principle can be cited to sanction such a position. There has been no circumstance shown which furnishes the foundation for an inference of negligence; and the circumstances which have been shown obviously do not bring the case within the doctrine of *res ipsa loquitur.* There was, consequently, no error in the ruling complained of, and the judgment of the Circuit Court must be affirmed.

Judgment affirmed.

87- 570 Ann. N.S. RR Co.

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MARSHALL, J., IN VORBRICH *v.* GEUDER, &c., COMPANY.

1897. 96 *Wisconsin*, 277, pp. 284, 285.

MARSHALL, J. (There are many cases that hold that an unexplained accident with a machine, not liable to occur if such machine was properly constructed and in a proper state of repair, is evidence of negligence;) as in *Spaulding* v. *C. & N. W. R. Co.*, 30 Wis. 110, where it was held that the escape of fire from a passing locomotive engine, sufficient to cause damage, raised a presumption of improper construction or insufficient repair or negligent handling of such engine. To the same effect are *Cummings* v. *Nat. Furnace Co.*, 60 Wis. 603; *Kurz & Huttenlocher Ice Co.* v. *M. & N. R. Co.*, 84 Wis. 171; *Stacy* v. *M., L. S. & W. R. Co.*, 85 Wis. 225; *Mullen* v. *St. John*, 57 N. Y. 567; *Volkmar* v. *Manhattan R. Co.*, 134 N. Y. 418; *McCarragher* v. *Rogers*, 120 N. Y. 526, and many others that might be cited. Such cases lay down a very well-recognized principle in the law of negligence, but do not reach the question here under discussion, and do not conflict in the slightest degree with numerous authorities that go on another principle, just as well recognized and firmly established, to the effect that undisputed proof of freedom of the machine from all discoverable defects, either in construction or repair, effectually overcomes any mere inference or presumption arising from the happening of the accident, so as to leave no question in that regard for the jury; as in *Spaulding* v. *C. & N. W. R. Co.*, 33 Wis. 582, where this court held the inference that a locomotive engine was defective, arising merely from the escape of fire therefrom sufficient to cause damage, rebutted by conclusive proof that the engine was free from discoverable defects, so as to leave nothing on that point for the consideration of a jury.

LATHROP, J., IN BUCKLAND *v.* NEW YORK, &c., R. R.

1902. 181 *Massachusetts*, 3, p. 4.

LATHROP, J. If we assume that the plaintiff was a passenger, and might have rested his case by showing that the car in which he was riding was derailed, thus making out a *prima facie* case, he did not choose to do so, but went on and showed by his own witnesses just how the accident happened. (Unless, therefore, the evidence put in by him tended to show negligence on the part of the defendant, he was not entitled to go to the jury.) *Winship* v. *New York, &c., R. R.*, 170 Mass. 464.

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CARMODY *v.* BOSTON GAS LIGHT CO.

1895. 162 *Massachusetts*, 539.[1]

Four actions for damages occasioned to the respective plaintiffs by the escape of gas were tried together.

Plaintiffs' evidence tended to show that gas escaped into plaintiffs' apartments from defendant's pipes in the street; that plaintiffs inhaled the gas while asleep; and that the escape was due to the defective condition of the pipe.

Defendant's evidence tended to prove that the defect in the pipe and the consequent escape of gas was due to acts of third persons of which defendant had no notice, and not to any negligence of the defendant.

The plaintiffs requested the judge to rule that there was evidence enough of want of proper care on the part of the defendant to make it responsible, on the ground that it was bound to conduct its gas in a proper manner; and that the fact that the gas escaped was *prima facie* evidence of some neglect on the part of the defendant.

The judge declined so to rule, and instructed the jury as follows:

"The mere fact that a pipe broke and the gas escaped is not of itself sufficient to establish the liability of the company. It is evidence for you to consider upon the question of neglect; but there is other evidence bearing upon this question of neglect, and so it becomes a matter for you to determine, in view of all the evidence bearing upon the question, the burden being upon the plaintiffs to satisfy you, as a result of all the evidence, that there was in fact a neglect by the defendant, through which, and by means of which, this gas escaped.

. . . . . .

Upon the counsel for the plaintiffs remarking, "Your honor has not given the requests I asked for, and so I will except to that," the judge replied as follows: "Well, you asked me to say that the fact that the gas escaped is *prima facie* evidence of some neglect on the part of the defendant. I do not choose to use that expression, '*prima facie* evidence,' unless the defendant consents to it. I have already told the jury that it was evidence of neglect, or of negligence, on the defendant's part, and evidence the force of which it was for them to determine in connection with any other evidence in the case bearing upon the same subject."

The jury returned a verdict for the defendant; and the plaintiffs alleged exceptions.

C. P. Sullivan, for the plaintiffs.

C. P. Greenough & J. P. Parmenter, for the defendant.

Barker, J. The plaintiffs asked the court to instruct the jury

[1] Statement abridged. — Ed.

"that there was evidence enough of want of proper care on the part of the defendant to make it responsible, on the ground that it was bound to conduct its gas in a proper manner, and that the fact that the gas escaped was *prima facie* evidence of some neglect on the part of the defendant." This request was copied from a ruling given in *Smith* v. *Boston Gas Light Co.* 129 Mass. 318, where this court said of it that, as applied to the facts of that case, it could not be said to be wrong. The presiding justice in the present case declined to give the instruction, but instructed the jury in other terms, which fully and correctly dealt with the phases of the cause to which the request was addressed.

While the ruling requested is sufficiently correct if it be construed as declaring that there was enough evidence of want of proper care to be submitted to the jury, it would invade the proper province of the jury if it was understood by them to mean that there was evidence enough to require them to find the defendant negligent, and the presiding justice was not bound to give a ruling which, as applied to the case upon trial, might have been so understood. Nor was he bound to use the Latin phrase upon which the plaintiffs insisted, but might well say, in place of it, that the fact that gas escaped was evidence of neglect "and evidence the force of which it was for them to determine in connection with any other evidence in the case bearing on the same subject."

The plaintiffs' exception did not go to the charge as given, but merely to the refusal of the request. They nevertheless argue that the statement of the charge, that "the mere fact that a pipe broke and the gas escaped is not of itself sufficient to establish the liability of the company," was incorrect. But there was evidence with which the jury had to deal tending to show that the defendant had used due care to conduct its gas in a proper manner, and that the escape of gas by which the plaintiffs were injured was due to the acts of third persons of which the defendant had no notice, and not to any negligence of the defendant.

It is apparent, from the situation of the evidence and the context of the charge, that the sentence to which the plaintiffs now object could not have been understood by the jury as forbidding them to draw the inference of negligence from the facts that a pipe broke and that gas escaped; but that, as there was other evidence bearing upon the question of negligence, they must consider and weigh it all, and not come to a conclusion upon two circumstances merely.

The true construction of the ruling asked, as applied to the case at bar, would be, that, as matter of law, the breaking of a pipe and the consequent escape of gas prove negligence. The true rule is, that a jury may find negligence from those circumstances, but it is for them to say whether they will do so; and, if there are other circumstances bearing on the question, they must weigh them all.

Instructions that evidence "is sufficient to show," or "has a tend-

ency to show," or "is enough to show," or "is *prima facie* evidence of," are not to be understood as meaning that there is a presumption of fact, but that the jury are at liberty to draw the inference from them. *Commonwealth* v. *Clifford*, 145 Mass. 97. *Commonwealth* v. *Keenan*, 148 Mass. 470. And so the instruction in a case where a number of circumstances bearing upon a question of fact are in evidence, that a part of them are not of themselves sufficient to establish the fact, coupled with explicit instructions that they are to be considered, must be understood as directing the jury to weigh together all the pertinent circumstances, and not to draw their inference from a part without considering all.

Exceptions overruled.

COBB, J., IN PALMER BRICK COMPANY *v.* CHENALL.

1904. 119 *Georgia*, 837, p. 842.

COBB, J. . . . The maxim *res ipsa loquitur* is simply a rule of evidence.

The general rule is that negligence is never presumed from the mere fact of injury, yet the manner of the occurrence of the injury complained of, or the attendant circumstances, may sometimes well warrant an inference of negligence. It is sometimes said that it warrants a presumption of negligence, but the presumption referred to is not one of law, but of fact. It is, however, more correct and less confusing to refer to it as an inference, rather than a presumption, and not an inference which the law draws from the fact, but an inference which the jury are authorized to draw, and not an inference which the jury are compelled to draw.

WALKER, J., IN STEWART *v.* VAN DEVENTER CARPET COMPANY.

1905. 138 *North Carolina*, 60, pp. 65–67.

WALKER, J. . . . There was much discussion by counsel of the doctrine of *res ipsa loquitur* and its relevancy to the facts of this case. The thing speaks for itself, is a principle applied by the law where under the circumstances shown the accident presumably would not have occurred in the use of a machine if due care had been exercised, or, in the case of an elevator, when in its normal operation after due inspection. The doctrine does not dispense with the requirement that the party who alleges negligence must prove the fact, but relates only

to the mode of proving it. The fact of the accident furnishes merely some evidence to go to the jury, which requires the defendant "to go forward with his proof." The rule of *res ipsa loquitur* does not relieve the plaintiff of the burden of showing negligence, nor does it raise any presumption in his favor. Whether the defendant introduces evidence or not, the plaintiff in this case will not be entitled to a verdict unless he satisfies the jury by the preponderance of the evidence that his injuries were caused by a defect in the elevator attributable to the defendant's negligence. The law attaches no special weight, as proof, to the fact of an accident, but simply holds it to be sufficient for the consideration of the jury even in the absence of any additional evidence. *Womble* v. *Grocery Co.*, 135 N. C. 474; 2 Labatt on Master & Servant, sect. 834; 4 Wigmore on Evidence, sect. 2509. In all other respects, the parties stand before the jury just as if there was no such rule. The judge should carefully instruct the jury as to the application of the principle, so that they will not give to the fact of the accident any greater artificial weight than the law imparts to it. Wigmore, in the section just cited, says the following considerations ought to limit the doctrine of *res ipsa loquitur:* 1. The apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection, or user; 2. Both inspection and user must have been, at the time of the injury, in the control of the party charged; 3. The injurious occurrence must have happened irrespective of any voluntary action at the time by the party injured. He says further that the doctrine is to some extent founded upon the fact that the chief evidence of the true cause of the injury, whether culpable or innocent, is practically accessible to the party charged and perhaps inaccessible to the party injured. What are the general limits of the doctrine and what is the true reason for its adoption, we will not now undertake to decide. It is established in the law as a rule for our guidance and must be enforced whenever applicable, and to the extent that it is applicable, to the facts of the particular case.[1]

[1] There is a conflict of authority upon the question whether the maxim *res ipsa loquitur* is applicable in an action by a servant against a master. See cases collected in an elaborate note, 6 Lawyers' Reports, Annotated, New Series, 337–363. See also 2 Labatt on Master & Servant, sects. 833, 834, 835; especially authorities cited in sect. 834, note 8. — Ed.

CHAPTER VII.

CONTRIBUTORY NEGLIGENCE.[1]

SECTION I.

Assuming that the Negligence of Each Party is Part of the Cause of Damage to Plaintiff, what Effect will Plaintiff's Negligence have on his Claim to recover?

NEAL *v.* GILLETT.

1855. 23 *Connecticut*, 437.[2]

ACTION to recover for personal injury alleged to have been incurred through the negligence of the defendants. Plaintiff claimed that the defendants were guilty of gross negligence, as the cause of the injury; and that, if the jury should so find, the plaintiff was entitled to recover, notwithstanding there had been on his part a want of mere ordinary care which might have essentially contributed to produce the injury complained of. The Court charged the jury in conformity to this claim of the plaintiff. Verdict for plaintiff. Motion for new trial.

R. D. Hubbard, in support of motion.

Hooker and *Philleo*, *contra*.

SANFORD, J. [Omitting opinion on another point.] The question, presented upon the second point, is, whether a plaintiff is entitled to recover for an injury, produced by the combined operation of his own want of "ordinary care," and the gross negligence of the defendant. The exact boundaries between the several degrees of care and their correlative degrees of carelessness, or negligence, are not always clearly defined or easily pointed out. We think, however, that by "ordinary care," is meant "that degree of care which may reasonably be expected from a person in the party's situation" (41 E. C. L. R., 425), that is,

[1] As to the distinction between assumption of risk and contributory negligence, see Professor Bohlen in 21 Harvard Law Review, 243-252; and compare majority and minority opinions in *Schlemmer* v. *Buffalo, &c., R. Co.*, 205 U. S. 1, pp. 11-14 and pp. 15-20.

In regard to the burden of proof as to contributory negligence, there is a conflict of authority. See cases collected in 1 Shearman & Redfield on Negligence, 4th ed., sects. 106-108. — ED.

[2] Part of case omitted; also arguments. — ED.

"reasonable care" (19 Conn. R., 572); and that "gross negligence" imports not a malicious intention or design to produce a particular injury, but a thoughtless disregard of consequences; the absence, rather than the actual exercise, of volition with reference to results.

What is the measure of "reasonable care" must of course depend upon the circumstances of the particular situation in which the party at the time is placed. But "reasonable care," every one, in the enjoyment of his rights, and the performance of his duties, is bound to exercise at all times and under all circumstances. When he has done that, he is answerable to no one for any consequences which ensue, for he has done all his duty; when he has done less than that, he is in fault, and if an injury ensue to another in consequence of such fault, he is responsible for it; if to himself, he must bear it. If in the enjoyment of their lawful rights by two persons, at the same time and place, reasonable care is exercised by both, and an injury accrues to one of them, it must be borne by the suffering party as a providential visitation. If such care is exercised by neither party, and an injury accrues to one of them, he must bear it, for he was himself in fault. And we hold that when the gist of the action is negligence merely,—whether gross or slight, the plaintiff is not entitled to recover, when his own want of ordinary, or reasonable care, has essentially contributed to his injury; because he is himself in fault, and because of the difficulty, if not impossibility, of ascertaining in what proportions the parties respectively, by their negligence, have contributed to the production of the injury, and whether it would have been produced at all but by the combined operation of the negligence of both. When the injury is intentional, and designed, other considerations apply.

For anything this Court can see, the negligence of the defendants, however gross, might have been entirely harmless, but for the plaintiff's own wrongful contribution to the combined causes which produced his injury. And so too, for anything this Court can see, although the defendants' negligence was gross, and fully adequate to the production of the injury, yet the plaintiff's exercise of reasonable care would have saved him from its consequences.

In the recent case of *Park* v. *O'Brien*, 23 Conn. R. 339, this Court said, "It is necessary for the plaintiff to prove, first, negligence on the part of the defendant, and, secondly, that the injury to the plaintiff occurred in consequence of that negligence. But in order to prove this latter point, the plaintiff must show that such injury was not caused, wholly, or in part, by his own negligence; for although the defendant was guilty of negligence, if the plaintiff's negligence contributed essentially to the injury, it is obvious that it did not occur by reason of the defendant's negligence." "Hence, to say that the plaintiff must show the latter" [the want of the plaintiff's concurring negligence], "is only saying that he must show that the injury was owing to the negligence of the defendant."

The same reasonable doctrine is sanctioned by other decisions, in

our own Court and elsewhere. *Birge* v. *Gardiner*, 19 Conn. R. 507; *Beers* v. *Housatonic R. R. Co.*, 19 Conn. R. 566, and cases there cited.

We think, therefore, that the charge of the Court, on this point, was wrong, and that a new trial ought to be granted.

In this opinion the other judges concurred, except Ellsworth, J., who was disqualified. *New trial to be granted.*[1]

PAYNE *v.* CHICAGO & ALTON RAILROAD COMPANY.

1895. 129 *Missouri*, 405.[2]

Action for personal injuries alleged to be caused by the negligence of defendant. Answer: a general denial, and a plea of contributory negligence.

The judge, at the request of plaintiff, gave the following instruction: —

"No. 7. One of the defences in this case interposed by the defendant is that of negligence on the part of plaintiff, Claude Payne, directly contributing to the injuries of which plaintiff complains; and the court instructs the jury that the law devolves upon the defendant the burden of proving such negligence by a preponderance of the evidence, and it is not sufficient that the jury may believe from the evidence that the plaintiff was simply guilty of negligence, but that the negligence of plaintiff, and not that of the defendant, must be the proximate or immediate cause of the injury, to excuse the defendant from liability."

In the Circuit Court plaintiff had judgment. Defendant appealed.

George Robertson, for appellant.

J. D. Shewalter, *M. C. James*, and *John S. Blackwell*, for respondent.

Macfarlane, J. [After deciding other points.] Defendant complains of instruction 7 given the jury at the request of plaintiff. The complaint is that the instruction improperly defines contributory negligence.

Contributory negligence, as the word imports, implies the concurring negligence of both plaintiff and defendant. The phrase is defined

[1] Is contributory negligence of plaintiff a bar to a suit for damage caused in part by defendant's failure to perform an obligation imposed upon him by statute?

The answer depends on the intention of the legislature, to be inferred from the statute. The language of the legislature must be interpreted in view of the subject-matter, and also in view of the general rule that statutes take their qualities and incidents from the common law. Bishop on Written Laws, sects. 117, 117*a*, 131, paragraphs 2 and 3; 134, paragraphs 3 and 4; 139, paragraph 1.

For illustrations of the application of the above principles of statutory construction, compare the following cases: *Quimby* v. *Woodbury*, 63 N. H. 370; *Catlett* v. *Young*, 143 Ill. 74; *Shulz* v. *Griffith*, 103 Iowa, 150; *Hussey* v. *King*, 83 Maine, 568; *Wadsworth* v. *Marshall*, 88 Maine, 263; *Kelly* v. *Killourey*, Connecticut A. D. 1908, 70 Atl. Rep. 1031; *Schutt* v. *Adair*, 99 Minn. 7; *Kirkpatrick* v. *Grand Trunk R. Co.*, 72 Vt. 263. — Ed.

[2] Only so much of the case is given as relates to a single point. — Ed.

by Beach as follows: "Contributory negligence, in its legal signification, is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or coöperating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of." Beach, Cont. Neg. [2 ed.] sect. 7. The definition given by Shearman & Redfield in their work on Negligence (sect. 61) is in substance and effect the same.

If the negligence of either plaintiff or defendants is the sole cause of the injury there could be no contributory negligence in the case. The question for the jury is whether the plaintiff could "by the exercise of such care and skill as he was bound to exercise, have avoided the consequence of the defendant's negligence." Lord Blackburn, L. R., 3 App. Cas. 1207. See, also, 4 Am. & Eng. Encyclopedia of Law, 18 & 19. It is clear that there could be no contributory negligence unless there was also negligence of defendant to which that of plaintiff could contribute. Unless the negligence of defendant was the proximate cause of the injury, there could be no liability. Unless the negligence of plaintiff was a proximate cause of the injury, his action, on the ground of contributory negligence, would not be defeated.

Testing the instruction by these rules, it cannot be approved. It tells the jury that "the negligence of plaintiff, and not that of defendant, must be the proximate or immediate cause of the injury to excuse the defendant from liability." They were told in effect that this result would follow though "plaintiff was simply guilty of negligence." The jury may as well have been told that to defeat a recovery on the plea of contributory negligence, it was necessary to find that the negligence of plaintiff was the sole proximate cause of the injury. The instruction ignored entirely concurring or contributory negligence of both parties, which is one essential element of contributory negligence. There are no degrees which distinguish the negligence made necessary by the law to defeat a recovery. And negligence which is proximate or a cause of the injury is sufficient. It does not matter that the concurring and coöperating negligence of defendant was negligence, *per se*, such as the violation of an ordinance, as in this case or statute law.

The instruction is also misleading wherein it informs the jury that in order for defendant to establish its plea of contributory negligence "it is not sufficient that the jury may believe from the evidence that plaintiff was simply guilty of negligence," and as qualified or explained, by what follows, does not correctly declare the law. The negligence to defeat a recovery must be a proximate cause for the injury, but need not be the sole proximate cause.

As the evidence on the issue of contributory negligence was very clear, we think the errors in this instruction prejudicial and must cause a reversal.

[Remainder of opinion omitted.]

Judgment reversed, and cause remanded.

START, J., IN LAFLAM v. MISSISQUOI PULP COMPANY.

1902. 74 *Vermont*, 125, p. 143.

START, J. The defendants, by their second request, asked for an instruction that if, by the exercise of ordinary care and prudence upon the part of the plaintiff, he would not have been injured, he cannot recover. The court instructed the jury, that, if the plaintiff's want of ordinary care or his negligence contributed in any material degree to the happening of the accident, he is not entitled to recover, even though the defendants were negligent. This was in accordance with the rule as it has sometimes been stated by this court. In *Magoon* v. *Boston & Maine R. R. Co.*, 67 Vt. 184, 31 Atl. 156, and in *Hill* v. *New Haven*, 37 Vt. 507, 88 Am. Dec. 613, it is said that, if the negligence or carelessness of the person injured contributes in any material degree to the production of the injury complained of, he cannot recover; but in *Reynolds* v. *Boston & Maine R. R. Co.*, 64 Vt. 66, 24 Atl. 134, 33 Am. St. Rep. 908, the holding is that, if the negligence of the plaintiff contributes in the *least* degree to the accident, there can be no recovery. We think this is the correct rule, and that the instruction should have conformed to it. The use of the word "material" left the jury at liberty to consider the degree of the plaintiff's negligence, which is not considered permissible in jurisdictions where the doctrine of contributory negligence prevails. To allow jurors to consider so-called degrees of negligence would, in effect, nullify this doctrine. 7 Am. & Eng. Enc. Law (2d ed.), 379.[1]

[1] "Negligence contributing as an efficient cause of injury will defeat an action therefor, irrespective of the *quantum* of negligence of the respective parties."

JAGGARD, J., in *O'Brien* v. *St. Paul City R. Co.*, 98 Minn. 205, pp. 207–208 (quoting 4 Current Law, 1568).

"An effect often has many proximate, and many remote, causes. If the negligence of the plaintiff was one of the proximate causes of the injury, — if it directly contributed to the unfortunate result, — he cannot recover, even though the negligence of the defendant also contributed to it."

SANBORN, J., in *Missouri Pac. R. Co.* v. *Mosely*, 57 Fed. Rep. 921, p. 925.

"While purporting to give a legal definition of contributory negligence, this instruction demands that such negligence shall be found the sole and direct cause of the accident — an interpretation at war with the term 'contributory' itself."

REYBURN, J., in *Hanheide* v. *St. Louis Transit Co.*, 104 Missouri App. 323, p. 330.

". . . if it appears that his [plaintiff's] negligence has contributed as an efficient cause to the injury of which he complains, the court will not undertake to balance the negligence of the respective parties for the purpose of determining which was most at fault. The law recognizes no gradations of fault in such case, and where both parties have been guilty of negligence, as a general rule, there can be no recovery. There is really no distinction between negligence in the plaintiff and negligence in the defendant, except that the negligence of the former is called 'contributory negligence.'"

WHITTLE, J., in *Richmond Traction Co.* v. *Martin's, Adm'r*, 102 Va. 209, p. 213.

". . . there was a lack of ordinary care on his [the deceased's] part, and where this occurs, contributing proximately to the injury, this lack will prevent a recovery, though the negligence of the other party may have much more contributed thereto."

BEARD, C. J., in *Memphis, &c., Co.* v. *Simpson*, Tennessee, A. D. 1907, 109 Southwestern Reporter, p. 1158. — ED.

BREESE, J., IN GALENA, &c. R. CO. *v.* JACOBS.

1858. 20 *Illinois*, 496–497.

[After citing decisions in other jurisdictions.] It will be seen from these cases that the question of liability does not depend absolutely on the absence of all negligence on the part of the plaintiff, but upon the relative degree of care or want of care as manifested by both parties; for all care or negligence is at best but relative, the absence of the highest possible degree of care showing the presence of some negligence, slight as it may be. The true doctrine, therefore, we think, is, that in proportion to the negligence of the defendant should be measured the degree of care required of the plaintiff; that is to say, the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to entitle him to recover. . . . We say, then, that in this, as in all like cases, the degrees of negligence must be measured and considered, and whenever it shall appear that the plaintiff's negligence is comparatively slight and that of the defendant gross, he shall not be deprived of his action.[1]

[Of late years legislatures have evinced a disposition to modify or abrogate the rules of the common law as to contributory negligence. Some instances are here given.]

The Act of Congress of June 11, 1906, Chapter 3073, undertaking to impose liability upon certain classes of common carriers for the hurt or death of an employee resulting from the negligence of a fellow servant, contained the following provision: —

"Section 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury."

This statute of June 11, 1906, was *held*, by a majority of the court, to be unconstitutional; on the ground that its provisions applied to carriers engaged in intrastate commerce, and not merely to carriers while engaged in interstate commerce. The question whether the specific provisions of Section 2 exceeded the limits of legislative power was discussed by only one member of the court, Mr. Justice MOODY, who thought that the legislature had power to make such changes i

1 "The doctrine of comparative negligence no longer exists in this State." WILKIN, J in *City of Macon* v. *Holcomb*, 205 Illinois, 643, p. 646. Nor has that doctrine been generally adopted by the courts of other States. As to legislative enactments, see statements in text of this work following *Galena R.* v. *Jacobs*. — ED.

the common law rules. *Howard* v. *Illinois Central R. Co.*, 207 U. S. 463, pp. 536–539, especially p. 538.

The above decision was given on January 6, 1908. On April 22, 1908, Congress passed an Act (Chapter 149), making carriers, while engaged in certain kinds of commerce, liable for the hurt or death of employees resulting from the negligence of fellow servants. This Act contains the following provision: —

"Section 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. *Provided*, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Chapter 254 of the Laws of Wisconsin, enacted in 1907, relating to the liability of railroad companies for injuries sustained by employees, contains the following provision: —

"Comparative Negligence. 4. In all cases where the jury shall find that the negligence of the company, or any officer, agent, or employee of such company, was greater than the negligence of the employee so injured, and contributing in a greater degree to such injury, then the plaintiff shall be entitled to recover, and the negligence, if any, of the employee so injured shall be no bar to such recovery."

Wisconsin, Laws of 1907, p. 496.[1]

In cases under the English Statute, known as The Workmen's Compensation Act, a plaintiff is not barred by his contributory negligence. The statute makes employers in certain kinds of business liable to compensate workmen for "personal injury arising out of and in the course of the employment," even though not occasioned by any fault of the employer or by any fault on the part of his other workmen. The imposition of such liability is, of course, a complete departure from the principles of the common law on the subject of torts; "indeed, the Act is a law of compulsory insurance, and quite beyond the region of actionable wrongs."[2] Under the provisions of the original statute of August 6, 1897, the plaintiff was not barred by his own fault if it fell short of "serious and wilful misconduct;" and under the

[1] See Statutes of Georgia, Florida, and Nebraska. Georgia Code, ed. 1895, Section 2322; and see Section 3830. General Statutes of Florida, ed. 1906, Section 3149. Compiled Statutes of Nebraska, ed. 1899, Section 4014 (Chapter 72, Article 1, Section 3).

As to the rule applied in Tennessee, see *Louisville, &c., R. Co.* v. *Fleming*, 14 Lea (Tenn.), 128, pp. 135–139; *Cincinnati, &c., R. Co.* v. *Davis*, 127 Fed. Rep. 933. — Ed.

[2] Pollock on Torts, 6th ed., 105.

present statute of December 21, 1906, even "serious and wilful misconduct" does not bar, if "the injury results in death or serious and permanent disablement."

Statute 60 & 61 Victoria, Chapter 37, Section 1 (*c*) reads: —

"If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed."

Statute of 6 Edward 7, Chapter 58, Section 1 (*c*), reads: —

"If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed."

The provisions of the German Civil Code should, perhaps, be regarded as declaratory of the law existing prior to the enactment of the Code rather than as a modification of that law. The material portion of Article 254 is as follows: —

"Article 254. If any fault of the injured party has contributed in causing the injury, the obligation to compensate the injured party and the extent of the compensation to be made depends upon the circumstances, especially upon how far the injury has been caused chiefly by the one or the other party.

"This applies also even if the fault of the injured party consisted only in an omission to call the attention of the debtor to the danger of an unusually serious injury which the debtor neither knew nor ought to have known, or in an omission to avert or mitigate the injury. . . ."

THE MAX MORRIS.

[CURRY, LIBELLANT. MORRIS, CLAIMANT.]

1890. 137 *U. S. Supreme Court Reports*, 1.[1]

THE case, as stated by the court, was as follows: —

This was a suit in Admiralty, brought in the District Court of the United States for the Southern District of New York, by Patrick Curry against the steamer Max Morris.

The libel alleged that on the 27th of October, 1884, the libellant was lawfully on board of that vessel, being employed to load coal upon her by the stevedore who had the contract for loading the coal; that, on that day, the libellant, while on the vessel, fell from her bridge to the deck, through the negligence of those in charge of her, in having removed from the bridge the ladder usually leading therefrom to the deck, and in leaving open, and failing to guard, the aperture thus left in the rail on the bridge; that the libellant was not guilty of negligence; and that he was injured by the fall and incapacitated from labor. He claimed $3000 damages.

[1] Portions of opinion omitted. Argument for appellant omitted. — ED.

The answer alleged negligence on the part of the libellant and an absence of negligence on the part of the claimant.

The District Court, held by Judge Brown, entered a decree in favor of the libellant for $150 damages, and $32.33 as one-half of the libellant's costs, less $47.06 as one-half of the claimant's costs, making the total award to the libellant $135.27. The opinion of the District Judge is reported in 24 Fed. Rep. 860. It appeared from that that the judge charged to the libellant's own fault all his pain and suffering and all mere consequential damages, and charged the vessel with his wages, at $2 per day, for seventy-five working days, making $150.

The claimant appealed to the Circuit Court, on the ground that the libel should have been dismissed. It was stipulated between the parties that the facts as stated in the opinion of the District Judge should be taken as the facts proved in the case, and that the appeal should be heard on those facts. Judge Wallace, who heard the case on appeal in the Circuit Court, delivered an opinion, in August, 1886, which is reported in 28 Fed. Rep. 881, affirming the decree of the District Court. No decree was made on that decision, but the case came up again in the Circuit Court on the 14th of March, 1887, the Court being held by Mr. Justice Blatchford and Judge Wallace, when a certificate was signed by them stating as follows: "The libellant was a longshoreman, a resident of the city and county of New York, and was, at the time when the said accident occurred, employed as longshoreman, by the hour, by the stevedore having the contract to load coal on board the steamship Max Morris. The injuries to the libellant were occasioned by his falling through an unguarded opening in the rail on the after-end of the lower bridge. The Max Morris was a British steamship, hailing from Liverpool, England. The defendant contends, as a matter of defence to said libel, that the injuries complained of by libellant were caused by his own negligence. The libellant contends that the injuries were occasioned entirely through the fault of the vessel and her officers. The Court finds, as a matter of fact, that the injuries to the libellant were occasioned partly through his own negligence and partly through the negligence of the officers of the vessel. It now occurs, as a question of law, whether the libellant, under the above facts, is entitled to a decree for divided damages. On this question the opinions of the judges are in conflict." On motion of the claimant, the question in difference was certified to this Court, and a decree was entered by the Circuit Court affirming the decree of the District Court and awarding to the libellant a recovery of $135.27, with interest from the date of the decree of the District Court, and $26.30 as the libellant's costs in the Circuit Court, making a total of $172. From that decree the claimant has appealed to this Court. Rev. Stat. §§ 652, 693; *Dow* v. *Johnson*, 100 U. S. 158.

Wilhelmus Mynderse, and *William Allen Butler*, for Morris, claimant and appellant.

James A. Patrick, for Curry, libellant and appellee.

Mr. Justice Blatchford, after stating the case as above reported, delivered the opinion of the Court.

The question discussed in the opinions of Judge Brown and Judge Wallace, and presented to us for decision, is whether the libellant was debarred from the recovery of any sum of money, by reason of the fact that his own negligence contributed to the accident, although there was negligence also in the officers of the vessel. The question presented by the certificate is really that question, although stated in the certificate to be whether the libellant, under the facts presented, was entitled to a decree "for divided damages." It appears from the opinion of the District Judge that he imposed upon the claimant "some part of the damage" which his concurrent negligence occasioned, while it does not appear from the record that the award of the $150 was the result of an equal division of the damages suffered by the libellant, or a giving to him of exactly one-half, or of more or less than one-half, of such damages.

The particular question before us has never been authoritatively passed upon by this Court, and is, as stated by the District Judge in his opinion, whether, in a Court of admiralty, in a case like the present, where personal injuries to the libellant arose from his negligence concurring with that of the vessel, any damages can be awarded, or whether the libel must be dismissed, according to the rule in common-law cases.

The doctrine of an equal division of damages in admiralty, in the case of a collision between two vessels, where both are guilty of fault contributing to the collision, had long been the rule in England, but was first established by this Court in the case of *The Schooner Catherine* v. *Dickinson*, 17 How. 170, and has been applied by it to cases where, both vessels being in fault, only one of them was injured, as well as to cases where both were injured, the injured vessel, in the first case, recovering only one-half of its damages, and, in the second case, the damages suffered by the two vessels being added together and equally divided, and the vessel whose damages exceeded such one-half recovering the excess against the other vessel. In the case of *The Schooner Catherine* v. *Dickinson*, *supra*, both vessels being held in fault for the collision, it was said by the Court, speaking by Mr. Justice Nelson, p. 177, that the well-settled rule in the English admiralty was "to divide the loss," and that "under the circumstances usually attending these disasters" the Court thought "the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance on both sides, in the navigation."

[In *Atlee* v. *Packet Co.*, 21 Wallace, 389, p. 395, Miller, J., said:] "But the plaintiff has elected to bring his suit in an admiralty Court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this Court the course of proceeding is in many respects different and the rules of decision are different. The mode

of pleading is different, the proceeding more summary and informal, and neither party has a right to trial by jury. An important difference as regards this case is the rule for estimating the damages. In the common-law Court the defendant must pay all the damages or none. If there has been on the part of the plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty Court, where there has been such contributory negligence, or, in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. This rule of the admiralty commends itself quite as favorably in its influence in securing practical justice as the other; and the plaintiff who has the selection of the forum in which he will litigate cannot complain of the rule of that forum." This Court, therefore, treated the case as if it had been one of a collision between two vessels.

Some of the cases referred to show that this Court has extended the rule of the division of damages to claims other than those for damages to the vessels which were in fault in a collision.

. . . . . .

The rule of the equal apportionment of the loss where both parties were in fault would seem to have been founded upon the difficulty of determining, in such cases, the degree of negligence in the one and the other. It is said by Cleirac (*Us et Coutumes de la Mer*, p. 68) that such rule of division is a rustic sort of determination, and such as arbiters and amicable compromisers of disputes commonly follow, where they cannot discover the motives of the parties, or when they see faults on both sides.

As to the particular question now presented for decision, there has been a conflict of opinion in the lower Courts of the United States.

. . . . . .

All these were cases in admiralty, and were not cases of collision between two vessels. They show an amelioration of the common-law rule, and an extension of the admiralty rule in a direction which we think is manifestly just and proper. Contributory negligence, in a case like the present, should not wholly bar recovery. There would have been no injury to the libellant but for the fault of the vessel; and while, on the one hand, the Court ought not to give him full compensation for his injury, where he himself was partly in fault, it ought not, on the other hand, to be restrained from saying that the fact of his negligence should not deprive him of all recovery of damages. As stated by the District Judge in his opinion in the present case, the more equal distribution of justice, the dictates of humanity, the safety of life and limb and the public good, will be best promoted by holding vessels liable to bear some part of the actual pecuniary loss sustained by the libellant, in a case like the present, where their fault is clear, provided the libellant's fault, though evident, is neither wilful, nor gross, nor inexcusable, and where the other circumstances present a

strong case for his relief. We think this rule is applicable to all like cases of marine tort founded upon negligence and prosecuted in admiralty, as in harmony with the rule for the division of damages in cases of collision. The mere fact of the negligence of the libellant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery.

The necessary conclusion is, that the question whether the libellant, upon the facts found, is entitled to a decree for divided damages, must be answered in the affirmative, in accordance with the judgment below. This being the only question certified, and the amount in dispute being insufficient to give this Court jurisdiction of the whole case, our jurisdiction is limited to reviewing this question. *Chicago Union Bank* v. *Kansas City Bank*, 136 U. S. 223. Whether, in a case like this, the decree should be for exactly one half of the damages sustained, or might, in the discretion of the Court, be for a greater or less proportion of such damages, is a question not presented for our determination upon this record, and we express no opinion upon it.

Decree affirmed.

[Various rules by which the courts in different countries deal with the question of damage from collision at sea, where both ships are in fault.]

"If minor or collateral differences be disregarded, there are amongst civilized nations four different ways of dealing with collision damage where both ships are in fault.

"1. To mass the total damage and divide it equally between the two ships.

"This is the British rule, and has been the American rule. . . .

"2. To leave the loss where it falls.

"This is the rule in Germany, Holland, Italy, Spain, and those of the South American States which have derived their law from Spain, and was the rule in Great Britain in our Courts of Common Law previous to the Judicature Act, 1873.

"3. To divide the loss proportionally to the value of the vessels in collision.

"A kind of general average principle obtaining in Turkey and Egypt.

"4. To divide the loss proportionally to the faults of the two vessels.

"This is the rule of France, Belgium, Norway, Sweden, Denmark, Portugal, Greece, and Roumania."

13 *Law Quarterly Review*, 17. *Cf.* 12 *Law Quarterly Review*, 260–263.

SECTION II.

Whether Plaintiff's Negligence is, in Whole or in Part, the Legal Cause of the Damage; and hence, under the Common Law Rule, a Bar to his Action.[1]

BUTTERFIELD *v.* FORRESTER.

1809. 11 *East*, 60.

THIS was an action on the case for obstructing a highway, by means of which obstruction the plaintiff, who was riding along the road, was thrown down with his horse, and injured, &c. At the trial before Bayley, J., at Derby, it appeared that the defendant, for the purpose of making some repairs to his house, which was close by the roadside at one end of the town, had put up a pole across this part of the road, a free passage being left by another branch or street in the same direction. That the plaintiff left a public house not far distant from the place in question at 8 o'clock in the evening in August, when they were just beginning to light candles, but while there was light enough left to discern the obstruction at one hundred yards distance; and the witness who proved this, said that if the plaintiff had not been riding very hard he might have observed and avoided it; the plaintiff, however, who was riding violently, did not observe it, but rode against it, and fell with his horse and was much hurt in consequence of the accident; and there was no evidence of his being intoxicated at the time. On this evidence Bayley, J., directed the jury, that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction; and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant, which they accordingly did.

Vaughan, *Serjt.*, now objected to this direction, on moving for a new trial; and referred to Buller's Ni. Pri. 26,[2] where the rule is laid down, that "if a man lay logs of wood across a highway, though a person may with care ride safely by, yet if by means thereof my horse stumble and fling me, I may bring an action."

BAYLEY, J. The plaintiff was proved to be riding as fast as his horse could go, and this was through the streets of Derby. If he had used ordinary care he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault.

[1] It is assumed that the Common Law Rule is represented by the decisions in *Neal* v. *Gillett*, *Payne* v. *Chicago & Alton R. Co.*, and *La Flam* v. *Missisquoi Pulp Co.*, *ante*, Section 1, pp. 240–244. — ED.

[2] The book cites Carth. 194, and 451, in the margin, which references do not bear on the point here in question.

LORD ELLENBOROUGH, C. J. A party is not to cast himself upon an obstruction which had been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action: an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff. *Rule refused.*

DAVIES *v.* MANN.

1842. 10 *Meeson & Welsby*, 546.

CASE for negligence. The declaration stated, that the plaintiff theretofore, and at the time of the committing of the grievance thereinafter mentioned, to wit, on, &c., was lawfully possessed of a certain donkey, which said donkey of the plaintiff was then lawfully in a certain highway, and the defendant was then possessed of a certain wagon and certain horses drawing the same, which said wagon and horses of the defendant were then under the care, government, and direction of a certain then servant of the defendant, in and along the said highway; nevertheless the defendant, by his said servant, so carelessly, negligently, unskilfully, and improperly governed and directed his said wagon and horses, that by and through the carelessness, negligence, unskilfulness, and improper conduct of the defendant, by his said servant, the said wagon and horses of the defendant then ran and struck with great violence against the said donkey of the plaintiff, and thereby then wounded, crushed, and killed the same, &c.

Servant present + negl.

The defendant pleaded not guilty.

At the trial, before Erskine, J., at the last Summer Assizes for the county of Worcester, it appeared that the plaintiff, having fettered the fore-feet of an ass belonging to him, turned it into a public highway, and at the time in question the ass was grazing on the off side of a road about eight yards wide, when the defendant's wagon, with a team of three horses, coming down a slight descent, at what the witness termed a smartish pace, ran against the ass, knocked it down, and the wheels passing over it, it died soon after. The ass was fettered at the time, and it was proved that the driver of the wagon was some little distance behind the horses. The learned judge told the jury, that though the act of the plaintiff, in leaving the donkey on the highway so fettered as to prevent his getting out of the way of carriages travelling along it, might be illegal, still, if the proximate cause of the injury was attributable to the want of proper conduct on the part

Most courts hold putting of animal in road = negl. which ends when "is left ..... " becomes a condition.

of the driver of the wagon, the action was maintainable against the defendant; and his Lordship directed them, if they thought that the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for the plaintiff. The jury found their verdict for the plaintiff, damages 40*s*.

Godson now moved for a new trial, on the ground of misdirection. The act of the plaintiff in turning the donkey into the public highway was an illegal one, and, as the injury arose principally from that act, the plaintiff was not entitled to compensation for that injury which, but for his own unlawful act, would never have occurred. [PARKE, B. The declaration states that the ass was lawfully on the highway, and the defendant has not traversed that allegation; therefore it must be taken to be admitted.] The principle of law, as deducible from the cases is, that where an accident is the result of faults on both sides, neither party can maintain an action. Thus, in *Butterfield* v. *Forrester*, 11 East, 60, it was held that one who is injured by an obstruction on a highway, against which he fell, cannot maintain an action, if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction. So, in *Vennall* v. *Garner*, 1 C. & M. 21, in case for running down a ship, it was held, that neither party can recover when both are in the wrong; and Bayley, B., there says, "I quite agree that if the mischief be the result of the combined negligence of the two, they must both remain in *statu quo*, and neither party can recover against the other." Here the plaintiff, by fettering the donkey, had prevented him from removing himself out of the way of accident; had his forefeet been free no accident would probaby have happened. *Pluckwell* v. *Wilson*, 5 Car. & P. 375; *Luxford* v. *Large*, Ibid. 421, and *Lynch* v. *Nurdin*, 1 Ad. & E. (N. S.) 29; 4 P. & D. 672, are to the same effect.

LORD ABINGER, C. B. I am of opinion that there ought to be no rule in this case. The defendant has not denied that the ass was lawfully in the highway, and therefore we must asume it to have been lawfully there; but even were it otherwise, it would have made no difference, for as the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there.

PARKE, B. This subject was fully considered by this Court in the case of *Bridge* v. *The Grand Junction Railway Company*, 3 M. & W. 246, where, as appears to me, the correct rule is laid down concerning negligence, namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could, by ordinary care, have avoided the consequences of the defendant's negligence. I am reported to have said in that case, and I believe quite correctly, that "the rule of law is laid down with perfect correctness in the case of *Butterfield* v. *Forrester*, that, although there may have been negligence on the part of the plaintiff, yet unless he

might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong." In that case of *Bridge* v. *Grand Junction Railway Company*, there was a plea imputing negligence on both sides; here it is otherwise; and the judge simply told the jury, that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway, was no answer to the action, unless the donkey's being there was the immediate cause of the injury; and that, if they were of opinion that it was caused by the fault of the defendant's servant in driving too fast or, which is the same thing, at a smartish pace, the mere fact of putting the ass upon the road would not bar the plaintiff of his action. All that is perfectly correct; for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road.

GURNEY, B., and ROLFE, B., concurred. *Rule refused.*

STILES *v.* GEESEY.

1872. 71 *Pennsylvania State*, 439.[1]

BEFORE THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of York County.

Action on the case by Jacob B. Geesey against Thomas Stiles, for alleged injury by the negligence of William Stiles, son of defendant, by which plaintiff's horse and carriage were damaged.

Neither parties present

Plaintiff's wife, driving in a light carriage of plaintiff's, hitched her horse to a tree on the road, and went into a friend's house. The carriage projected into the travelled part of the road. Whilst the carriage was so left, the defendant's son, William Stiles, was driving his father's team with a loaded wagon along the road. He got off to do something to his wagon; and seeing an acquaintance in a neighboring barn, stopped a moment to exchange a few words with him, the team moving on slowly at the time with the load up the hill, keeping the travelled track of the road till the front horse was just behind plaintiff's carriage standing unattended where it was left. At this point of time William Stiles was behind his own wagon, at some distance from it; and did not see the obstruction in the road in time to

[1] The statement of facts is abridged from the statement in the opinion and from the statement made by the reporter. The citations of counsel are omitted. — ED.

avoid a collision. The wagon collided with the carriage. Stiles halloed "Whoa," and his horses stopped. In the collision, the plaintiff's horse was fatally injured.

The third point of the plaintiff, which was affirmed in the charge to the jury by Fisher, P. J., is as follows: —

"That Thomas Stiles cannot excuse the negligence of William Stiles by showing that the plaintiff's property was placed where it received the injury by want of ordinary care by Mrs. Geesey, if, in the opinion of the jury such want is imputable to her, should the jury believe that William Stiles was chargeable with negligence in leaving his team and permitting it to go along the highway unattended."

Verdict for plaintiff.

W. C. Chapman and *I. L. Mayer*, for plaintiff in error.

Cochran & Hay, for defendant in error.

READ, J. [After stating the facts.] We have taken in brief, the defendant's statement of his defence, which fairly raises the question of contributory negligence. "It is an incontestable principle that where the injury complained of is the product of mutual or concurring negligence, no action for damages will lie. The parties being mutually in fault there can be no apportionment of the damages. The law has no scales to determine in such cases whose wrong-doing weighed most in the compound that occasioned the mischief:" per Woodward, J., 12 Harris, 469.

"The question presented to the Court or the jury is never one of comparative negligence, as between the parties; nor does very great negligence on the part of a defendant so operate to strike a balance of negligence as to give a judgment to a plaintiff whose own negligence contributes in any degree to the injury." *Wilds* v. *Hudson River Railroad Co.*, 24 N. Y. 432.

The third error assigned is that the Court erred in their charge to the jury on the plaintiff's third point, which was as follows: "That Thomas Stiles cannot excuse the negligence of William Stiles by showing that the plaintiff's property was placed where it received the injury, by want of ordinary care by Mrs. Geesey, if in the opinion of the jury such want is imputable to her, should the jury believe William Stiles was chargeable with negligence, in leaving his team and permitting it to go along the highway unattended," which point the Court affirmed, holding that although there was contributory negligence on the part of the plaintiff, he was entitled to recover from the defendant on account of his negligence. This was a binding instruction upon the jury, leaving nothing for them to inquire into practically, except the negligence of the defendant. In this the Court committed a clear error, and the judgment must be reversed, and *venire de novo* awarded.

RADLEY, ET AL. *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

1876. *Law Reports*, 1 *Appeal Cases*, 754.[1]

THIS was an appeal against a decision of the Court of Exchequer Chamber.

The appellants were the plaintiffs in an action brought in the Court of Exchequer, in which they claimed to recover damages for the destruction of a bridge occasioned, as they alleged, by the negligence of the defendants' servants. The plaintiffs were owners of the Sankey Brook Colliery, in the county of Lancaster, which was situated near a branch line of the defendants' railway. There was a siding belonging to the plaintiffs, which communicated with the railway, and the defendants' servants were in the habit of taking trucks loaded with coals from this siding, in order to run them on the railway to forward them to their destination, and also of bringing back empty trucks and running them from the railway on to the siding. On Saturday after working hours, when all the colliery men had gone away, the defendants' servants ran some of the plaintiffs' empty trucks from the railway upon the siding and there left them. In that position they remained. One of the watchmen employed by the plaintiffs knew that they were there, but nothing was done to remove them to a different place. In the first of these trucks, had been placed a truck which had broken down, and the height of the two trucks combined was nearly eleven feet. There was, in advance of the spot where the trucks had been left, a bridge placed over a part of the siding, the span of which bridge was about eight feet from the ground. On Sunday afternoon the defendants' servants brought a long line of empty trucks belonging to the plaintiffs, and ran them on the line of the siding, pushing on the first set of trucks in front. Some resistance was perceived, and the pushing force of the engine employed was increased, and the result was, as the two trucks at the head of the line could not pass under the bridge, they struck with great force against it and broke it down.[2] For the damage thereby occasioned this action was brought. The defence was contributory negligence; it being insisted that the plaintiffs ought to have moved the first set of trucks to a safe place, or at all events, not to have left the truck with the disabled truck in it so as to be likely to occasion mischief. At the trial before Mr. Justice Brett, at the Summer Assizes at Liverpool, in 1873, the

[1] Arguments omitted. — ED.

[2] ". . . The wagon so loaded coming to the bridge and being unable to pass underneath it, the train stopped, and those who had charge of it, without looking to ascertain the cause of the stoppage, gave momentum to the engine to such an extent that the wagon with its load knocked the bridge down." Statement of facts in opinion of Bramwell, B., L. R. 9 Exch. p. 72. Compare statement in L. R. 10 Exch p. 102. — ED.

learned judge told the jury that "you must be satisfied that the plaintiffs' servants did not do anything which persons of ordinary care, under the circumstances, would not do, or that they omitted to do something which persons of ordinary care would do. . . . It is for you to say entirely as to both points; but the law is this, the plaintiffs must have satisfied you that this happened by the negligence of the defendants' servants, and without any contributory negligence of their own, in other words that it was solely by the negligence of the defendants' servants. If you think it was, then your verdict will be for the plaintiffs. If you think it was not solely by the negligence of the defendants' servants, your verdict must be for the defendants."[1] The jurors having, on this direction, stated that they thought there was contributory negligence on the part of the plaintiffs, the learned judge directed that the verdict should be entered for the defendants, but reserved leave for the plaintiffs to move.

A rule having been obtained for a new trial, it was after argument before Barons Bramwell and Amphlett made absolute.[2] On appeal to the Exchequer Chamber the decision was, by Justices Blackburn, Mellor, Lush, Brett, and Archibald (*diss.* Justice Denman), reversed.[3] This appeal was then brought.

Mr. Herschell, Q. C., and *Mr. Baylis*, Q. C , for the appellants.

Mr. Aspinall, Q. C., and *Mr. McConnell*, for the respondents.

Lord Penzance. My Lords, the action out of which this appeal arises is an action charging the defendants with negligence (through their servants) in so managing the shunting of some empty coal-wagons as to knock down a bridge and some staging and some colliery headgearing, which stood upon it, and belonged to the plaintiffs.

The first question on the appeal is, whether the Court of Exchequer Chamber was right in holding that there was any evidence, proper to be submitted to the jury, tending to the conclusion that the plaintiffs themselves had been guilty of some negligence in the matter, and that such negligence had contributed to produce the accident and injury of which they complained.

The general facts of the case, the particular facts which gave rise to the imputation of negligence, and the contention of both sides as to the fair result of these facts, are stated in the judgment of the Court of Exchequer delivered by Baron Bramwell. His Lordship here read the statement from Mr. Baron Bramwell's judgment.[4]

It may be admitted that this is a fair and full statement of the arguments and considerations on the one side, and on the other, upon which the question of the plaintiffs' negligence had to be decided. But it had to be decided by the jurors, and not by the Court, and I am unable to perceive any reason why the learned judge did wrong in submitting these arguments and considerations to their decision accordingly. The bare statement of them is enough to show that there

[1] Printed papers in the case.
[2] Law Rep. 9 Ex. 71.
[3] Law Rep. 10 Ex. 700.
[4] Law Rep. 9 Ex. at p. 72.

were in the case facts and circumstances sufficient at least to raise the question of negligence, whether they were a sufficient proof of negligence or not.

The decision, therefore, of the Exchequer Chamber upon this matter ought, I think, to be upheld.

The remaining question is whether the learned judge properly directed the jury in point of law. The law in these cases of negligence is, as was said in the Court of Exchequer Chamber, perfectly well settled and beyond dispute.

The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident.

But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiffs' negligence will not excuse him.

This proposition, as one of law, cannot be questioned. It was decided in the case of *Davies* v. *Mann*,[1] supported in that of *Tuff* v. *Warman*,[2] and other cases, and has been universally applied in cases of this character without question.

The only point for consideration, therefore, is whether the learned judge properly presented it to the mind of the jury.

It seems impossible to say that he did so. At the beginning of his summing-up he laid down the following as the propositions of law which governed the case: It is for the plaintiffs to satisfy you that this accident happened through the negligence of the defendants' servants, and as between them and the defendants, that it was solely through the negligence of the defendants' servants. They must satisfy you that it was solely by the negligence of the defendants' servants, or, in other words, that there was no negligence on the part of their servants contributing to the accident; so that, if you think that both sides were negligent, so as to contribute to the accident, then the plaintiffs cannot recover.

This language is perfectly plain and perfectly unqualified, and in case the jurors thought there was any contributory negligence on the part of the plaintiffs' servants, they could not, without disregarding the direction of the learned judge, have found in the plaintiffs' favor, however negligent the defendants had been, or however easily they might with ordinary care have avoided any accident at all.

The learned judge then went on to describe to the jury what it was that might properly be considered to constitute negligence, first in the conduct of the defendants, and then in the conduct of the plaintiffs:

[1] 10 M. & W. 546.

[2] 5 C. B. (N. S.) 573; 27 L. J. C. P. 322

and having done this, he again reverted to the governing propositions of law, as follows: "There seem to be two views. It is for you to say entirely as to both points. But the law is this, the plaintiff must have satisfied you that this happened by the negligence of the defendants' servants, and without any contributory negligence of their own; in other words, that it was solely by the negligence of the defendants' servants. If you think it was, then your verdict will be for the plaintiffs. If you think it was not solely by the negligence of the defendants' servants, your verdict must be for the defendants."

This, again, is entirely without qualification, and the undoubted meaning of it is, that if there was any contributory negligence on the part of the plaintiffs, they could in no case recover. Such a statement of the law is contrary to the doctrine established in the case of *Davies* v. *Mann*,[1] and the other cases above alluded to, and in no part of the summing-up is that doctrine anywhere to be found. The learned counsel were unable to point out any passage addressed to it.

It is true that in part of his summing-up the learned judge pointed attention to the conduct of the engine-driver, in determining to force his way by violence through the obstruction, as fit to be considered by the jury on the question of negligence; but he failed to add that if they thought the engine-driver might at this stage of the matter by ordinary care have avoided all accident, any previous negligence of the plaintiffs would not preclude them from recovering.

In point of fact the evidence was strong to show that this was the immediate cause of the accident, and the jury might well think that ordinary care and diligence on the part of the engine-driver would, notwithstanding any previous negligence of the plaintiffs in leaving the loaded-up truck on the line, have made the accident impossible. This substantial defect of the learned judge's charge is that that question was never put to the jury.

On this point, therefore, I propose to move that your Lordships should reverse the decision of the Exchequer Chamber, and direct a new trial.

The Lord Chancellor (Lord Cairns). My Lords, I have had the advantage of considering the opinion which has just been expressed to your Lordships in this case by my noble and learned friend, and, concurring as I do with every word of it, I do not think it is necessary that I should do more than say that I hope your Lordships will agree to the motion which he has proposed.

Lord Blackburn. My Lords, I agree entirely with the noble Lord who has first spoken as to what were the proper questions for the jury in this case, and that they were not decided by the jury. I am inclined to think that the learned judge did in part of his summing-up sufficiently ask the proper questions, had they been answered, but unfortunately he failed to have an answer from the jury to those ques-

[1] 10 M. & W. 546.

tions, it appearing by the case that the only finding was as to the plaintiffs' negligence.

I agree, therefore, in the result that there should be a new trial.

LORD GORDON. My Lords, I entirely concur in the motion which has been submitted to your Lordships by my noble and learned friend on the other side of the House. The question is one which has given rise to some difficulty in the courts of Scotland, but I think that it is very likely that the opinion which has been expressed in this case will be regarded as a very useful authority for guiding their decisions.

Judgment of the Court of Exchequer Chamber reversed.

Judgment of the Court of Exchequer restored, and a new trial ordered, with costs.

Lords' Journals, December 1, 1876.

MARSHALL, J., IN OATES *v.* METROPOLITAN STREET RAILWAY COMPANY.

1902. 168 *Missouri*, 535, pp. 547–549.

MARSHALL, J. . . Instructions three and seven given for the defendant sharply drew a distinction between the negligence of the defendant and the contributory negligence of the plaintiff. Those instructions declared the law to be that the defendant was not liable unless its negligence was the direct cause of the injury, while the plaintiff was not entitled to recover if his negligence "but contributes to the injury." That is, that the defendant was liable only for direct negligence, while the plaintiff was cut off from recovery if he was guilty of any negligence, however slight or remote or indirect it may have been.

The law is that a defendant is liable if his negligence was the direct and proximate cause of the injury, unless the plaintiff has also been guilty of such negligence as directly contributed to the happening of the injury, and the defendant is not liable no matter how negligent he may have been if the plaintiff's negligence has thus contributed to the injury, for the doctrine of comparative negligence has never obtained in this State. [*Hurt* v. *Railroad*, 94 Mo. l. c. 264.] In each instance the negligence and the contributory negligence must be direct, that is, must have entered into and formed a part of the efficient cause of the accident. [*Hoepper* v. *Hotel Co.*, 142 Mo. l. c. 388; Beach on Contr. Neg. (2 ed.), sec. 24; *Matthews* v. *Toledo*, 21 Ohio Cir. Ct. Rep. 69; *Dunkman* v. *Railroad*, 16 Mo. App. 548; *Corcoran* v. *Rail-*

road, 105 Mo. 399; *Murray* v. *Railroad*, 101 Mo. 236; *Kellny* v. *Railroad*, 101 Mo. 67; *Hicks* v. *Railroad*, 46 Mo. App. 304; *Pinnell* v. *Railroad*, 49 Mo. App. 170; *Meyers* v. *Railroad*, 59 Mo. 223.]

Mere negligence, without any resulting damage, no more bars a plaintiff's recovery than it creates a liability against a defendant. [*Dickson* v. *Railroad*, 124 Mo. 140.] Remote negligence which does not become an efficient cause, neither creates nor bars a liability. [*Kennedy* v. *Railroad*, 36 Mo. 351; *Meyers* v. *Railroad*, 59 Mo. 223.] It is only where the plaintiff's negligence contributes directly to his injury that it precludes his recovery therefor. [*Moore* v. *Railroad*, 126 Mo. 265.] And the plaintiff's contributory negligence must mingle with the defendant's negligence as a direct and proximate cause in order to bar a recovery. [*Nolan* v. *Shickle*, 69 Mo. 336; *Frick* v. *Railroad*, 75 Mo. 542.]

These instructions were, therefore, erroneous, and as the jury was misdirected and as the plaintiff had made out a *prima facie* case, he was entitled to have the law properly declared to the jury, and the trial court did right in granting a new trial.

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NASHUA IRON AND STEEL CO. *v.* WORCESTER & NASHUA RAILROAD CO.

1882. 62 *New Hampshire*, 159.

CASE. Demurrer to the declaration.

C. H. Burns and *C. W. Hoitt*, for plaintiffs.

A. F. Stevens, for defendants.

CARPENTER, J. The declaration alleges that by the defendants' careless management of their engine and cars, the plaintiffs' horse was frightened, and caused to run upon and injure Ursula Clapp, who was without fault; that Clapp brought her action therefor against the plaintiffs, and recovered judgment for damages, which they paid; that the defendants had notice of, and were requested to defend, the suit. The defendants demur. Inasmuch as Clapp could not have recovered against the plaintiffs unless they were in fault (*Brown* v. *Collins*, 53 N. H. 442; *Lyons* v. *Child*, 61 N. H. 72), it must be taken that their negligence co-operated with that of the defendants to produce the injury. If the plaintiffs were not liable in that action because their negligence was not, and the defendants' negligence was, the cause of the accident, the objection is not now open to the defendants. *Littleton* v. *Richardson*, 34 N. H. 179. In relation to Clapp, both parties were wrong-doers. She could pursue her remedy against either or both of them at her election. *Burrows* v. *March Gas Co.*, L. R. 5 Ex. 67, 71.

One of several wrong-doers, who has been compelled to pay the dam-

ages caused by the wrong, has in general no remedy against the others. He cannot make his own misconduct the ground of an action in his favor. To this proposition there are, it has been said, so many exceptions, that it can hardly, with propriety, be called a general rule. *Bailey* v. *Bussing*, 28 Conn. 455. Its application is restricted to cases where the person seeking redress knew, or is presumed to have known, that the act for which he has been mulcted in damages was unlawful. *Jacobs* v. *Pollard*, 10 Cush. 287, 289; *Coventry* v. *Barton*, 17 Johns. 142. In many instances several parties may be liable in law to the person injured, while as between themselves some of them are not wrong-doers at all; and the equity of the guiltless to require the actual wrong-doer to respond for all the damages, and the equally innocent to contribute his proportion, is complete. *Wooley* v. *Batte*, 2 C. & P. 417; *Pearson* v. *Skelton*, 1 M. & W. 504; *Betts* v. *Gibbins*, 2 A. & E. 57; *Adamson* v. *Jarvis*, 4 Bing. 66; *Avery* v. *Halsey*, 14 Pick. 174; *Gray* v. *Boston Gas Light Co.*, 114 Mass. 149; *Churchill* v. *Holt*, 127 Mass. 165, and 131 Mass. 67; *Bailey* v. *Bussing*, *supra*; *Smith* v. *Foran*, 43 Conn. 244. These cases, instead of being exceptions to the rule, seem rather not to fall within it. The right of recovery rests in the one case upon the principle that he who without fault on his part is injured by another's wrongful act is entitled to indemnity, and in the other upon the doctrine of contribution. One of two masters, who is compelled to pay damages by reason of his servant's negligence, may have contribution from the other because he has removed a burden common to both. They may recover indemnity of the servant, because as against him they are without fault, and are directly injured by his misconduct. One who is so far innocent that he can recover for an injury to his person or property, may also recover whatever sum he, by reason of his relation to the wrong, has been compelled to pay to a third person. If the plaintiffs could recover for an injury to their horse, caused by the accident, they may recover the sum which they paid to Clapp.

The declaration is general. It does not disclose the particulars of the plaintiffs' negligence, by reason of which Clapp recovered against them. Under it, cases differing widely in their facts and legal aspects may be proved. Among others possible, it may be shown that the horse was in the charge of the plaintiffs' servants, who might have prevented its fright or its running after the fright, or if they could do neither, that they might nevertheless have avoided the injury to Clapp; or it may appear that the plaintiffs' negligence consisted solely in permitting the horse, whether attended or unattended by their servants, to be at the place where it was at the time of the fright. The generality of the declaration does not render it bad in law. *Corey* v. *Bath*, 35 N. H. 531. If the plaintiffs are entitled to judgment upon any state of facts provable under it, the demurrer must be overruled. Whether the plaintiffs can recover in any case, and if so, in what cases, possible to be proved under the declaration, are speculative or hypothetical

questions, of which none may, and all cannot, arise. They involve substantially the whole subject of the law relating to mutual negligence. The case might properly be discharged without considering them (*Smith* v. *Cudworth*, 24 Pick. 196), and the parties required to present by the pleadings, or by a verdict, the facts upon which their rights depend. A brief consideration, however, of the general questions involved, may, it is thought, facilitate a trial, and save expense to the parties.

Ordinary care is such care as persons of average prudence exercise under like circumstances. *Tucker* v. *Henniker*, 41 N. H. 317; *Sleeper* v. *Sandown*, 52 N. H. 244; *Aldrich* v. *Monroe*, 60 N. H. 118. Every one in the conduct of his lawful business is bound to act with this degree of care, and if he fails to do so is responsible for the consequences. It follows that a person injured by reason of his want of ordinary care, or (since the law makes no apportionment between actual wrong-doers) by the joint operation of his own and another's negligence, is remediless. This general rule of law justly applied to the facts determines, it is believed, the rights of the parties in all actions for negligence. In its application, the law, as in various other cases, deals with the immediate cause, — the cause as distinguished from the occasion, — and looks at the natural and reasonably to be expected effects. *Cowles* v. *Kidder*, 24 N. H. 383; *Hooksett* v. *Company*, 44 N. H. 108; *McIntire* v. *Plaisted*, 57 N. H. 608; *Solomon* v. *Chesley*, 59 N. H. 243; *China* v. *Southwick*, 12 Me. 238; *Lowery* v. *Western U. Tel. Co.*, 60 N. Y. 198; *Rigby* v. *Hewitt*, 5 Exch. 243; *Blyth* v. *Birmingham Waterworks Co.*, 11 Exch. 781; *Bank of Ireland* v. *Evans's Charities*, 5 H. L. Ca. 389, 410, 411; *Ionides* v. *Marine Ins. Co.*, 14 C. B. N. S. 259; *Romney Marsh* v. *Trinity House*, L. R. 5 Ex. 204; *Holmes* v. *Mather*, L. R. 10 Ex. 268; *Sharp* v. *Powell*, L. R. 7 C. P. 253; *Pearson* v. *Cox*, 2 C. P. Div. 369; *Tutein* v. *Hurley*, 98 Mass. 211; Bro. Leg. Max. 215.

Actions for negligence may, for convenience of consideration, be separated into four classes, namely, — where, upon the occasion of the injury complained of (1) the plaintiff, (2) the defendant, or (3) neither party was present, and (4) where both parties were present. In all of them it may happen that both parties were more or less negligent. Actions upon the statute of highways are a common example of the first class. The negligence of the defendant, however great, does not relieve the plaintiff from the duty of exercising ordinary care. If, notwithstanding the defective condition of the highway, this degree of care on the part of the plaintiff would prevent the accident, his and not the defendant's negligence, though but for the latter it could not happen, is, in the eye of the law, its sole cause. *Farnum* v. *Concord*, 2 N. H. 394; *Butterfield* v. *Forrester*, 11 East, 60. In this class of cases, an injury which the plaintiff's negligence contributes to produce could not happen without it. The not uncommon statement that the plaintiff cannot recover if his negligence contributes in any degree to cause the injury, is strictly correct, although the word "contribute"

may be, as Crompton, J., in *Tuff* v. *Warman*, 5 C. B. N. S. 584, says it is, "a very unsafe word to use," and "much too loose." The result is the same whether the plaintiff acts with full knowledge of the danger, or, by reason of a want of proper care, fails to discover it seasonably. If he is not bound to anticipate, and in advance provide for, another's negligence, he may not wilfully or negligently shut his eyes against its possibility. He is bound to be informed of everything which ordinary care would disclose to him. He can no more recover for an injury caused by driving into a dangerous pit, of which he is ignorant, but of which ordinary care would have informed him, than for one caused by carelessly driving into a known pit. *Norris* v. *Litchfield*, 35 N. H. 271; *Clark* v. *Barrington*, 41 N. H. 44; *Tucker* v. *Henniker*, 41 N. H. 317; *Winship* v. *Enfield*, 42 N. H. 213, 214; *Underhill* v. *Manchester*, 45 N. H. 220.

The defendant's negligence being found or conceded, the remaining question is, whether the plaintiff, by the exercise of ordinary care, could have escaped the injury. If he could not, he is free from fault, and is entitled to recover. If he could, he not only cannot recover for his own injury, but is himself liable to the other party, if the latter is injured; and the case becomes one of the second class, of which *Davies* v. *Mann*, 10 M. & W. 546, is an instance. The defendant is liable here for the same reason that, as plaintiff, he could not recover,— that is to say, because ordinary care on his part would have prevented the injury. The fact that one has carelessly exposed his property in a dangerous situation does not absolve his neighbors from the obligation of conducting themselves in regard to it with ordinary care. An injury which that degree of care would prevent is caused by the want of it, and not by the owner's negligence in leaving his property in a perilous position. A surgeon, called to set a leg carelessly broken, cannot successfully urge, in answer to a suit for mal-practice, that the patient's negligence in breaking his leg caused the crooked or shortened limb. *Lannen* v. *Albany Gas-light Co.*, 44 N. Y. 459, 463; *Hibbard* v. *Thompson*, 109 Mass. 286, 289. So far as the question of civil liability is concerned, there is no distinction, except it may be in the measure of damages (*Fay* v. *Parker*, 53 N. H. 342, *Bixby* v. *Dunlap*, 56 N. H. 456), between wilful and negligent wrongs. One who, without reasonable necessity, kills his neighbor's ox, found trespassing in his field, is equally liable whether he does it purposely or carelessly. *Aldrich* v. *Wright*, 53 N. H. 398; *McIntire* v. *Plaisted*, 57 N. H. 606; Cool. Torts 688–694. Mann would be no more liable for wilfully shooting the fettered ass which Davies has carelessly left in the public highway, than he is for the running over it, which, by ordinary care, he could avoid. The owner's negligence, in permitting the ox to stray and in leaving the ass fettered in the street, although without it the injury would not happen, is no more the cause, in a legal sense, of the negligent than of the wilful wrong. In each case alike,— as in that of the broken leg,— it merely affords the wrong-doer an opportu-

nity to do the mischief. *Bartlett* v. *Boston Gas-light Co.*, 117 Mass 533; *Clayards* v. *Dethick*, 12 Q. B. 439, 445.

Knowledge, or its equivalent, culpable ignorance, and ignorance without fault of the situation, are circumstances by which, among others, the requisite measure of vigilance is determined. *Griffin* v. *Auburn*, 58 N. H. 121, 124; *Palmer* v. *Dearing*, 93 N. Y. 7; *Robinson* v. *Cone*, 22 Vt. 213. The question of contributory negligence is not involved. The wrong, if any, is the negligent injury of property carelessly exposed to danger. The only question is, whether the defendant could have prevented it by ordinary care. If he could not, he is without fault, and not liable. If he could, his negligence is, in law, the sole cause of the injury. *Davies* v. *Mann*, 10 M. & W. 546; *Radley* v. *London, &c. Railway*, 1 App. Ca. 754; *Mayor of Colchester* v. *Brooke*, 7 Q. B. 377; *Isbell* v. *N. Y. & N. H. Railroad*, 27 Conn. 393; *Trow* v. *Vt. Central Railroad*, 24 Vt. 487; *Harlan* v. *St. Louis, &c. Railroad*, 64 Mo. 480; *Kerwhacker* v. *Cleveland, &c. Railroad*, 3 Ohio St. 172.

The law is not affected by the presence or the absence of the parties, nor by the difficulty of applying it to complicated facts. To warrant a recovery where both parties are present at the time of the injury, as well as in other cases, ability on the part of the defendant must concur with non-ability on the part of the plaintiff to prevent it by ordinary care. Their duty to exercise this degree of care is equal and reciprocal; neither is exonerated from his obligation by the present or previous misconduct of the other. The law no more holds one responsible for an unavoidable, or justifies an avoidable, injury to the person of one who carelessly exposes himself to danger, than to his property, similarly situated in his absence. He who cannot prevent an injury negligently inflicted upon his person or property by an intelligent agent, "present and acting at the time" (*State* v. *Railroad*, 52 N. H. 528, 557; *White* v. *Winnisimmet Co.*, 7 Cush. 155, 157; *Robinson* v. *Cone*, 22 Vt. 213), is legally without fault, and it is immaterial whether his inability results from his absence, previous negligence, or other cause. On the other hand, his neglect to prevent it, if he can, is the sole or co-operating cause of the injury. No one can justly complain of another's negligence, which, but for his own wrongful interposition, would be harmless. *Parker* v. *Adams*, 12 Met. 415.

Cases of this class assume a great variety of aspects. While all are governed by the fundamental principle, that he only who by ordinary care can and does not prevent an injury, is responsible in damages, it is impossible to formulate a rule in language universally applicable. A statement of the law correct in its application to one state of facts may be inaccurate when applied to another. Instructions to the jury proper and sufficient in a case of the first class, would be not only inappropriate but incorrect in one of the second class. The doctrine laid down in *Tuff* v. *Warman*, 5 C. B. N. S. 573, 585, however just and well suited to the evidence in that case, was held erroneous as

applied to the facts in *Murphy* v. *Deane*, 101 Mass. 455, 464–466, and, as a general proposition, seems indefensible.

An accident may result from a hazardous situation caused by the previous negligence of one or both parties. If, at the time of the injury, the defendant is unable to remove the danger which his negligence has created, the case becomes, in substance, one of the first class; the plaintiff can recover or not, according as, by ordinary care, he can or cannot protect himself from the natural consequences of the situation. If the plaintiff, in like manner, is unable to obviate the danger which his prior negligence has produced, the case becomes, substantially, one of the second class; he can recover or not, according as the defendant, by the same degree of care, can or cannot avoid the natural consequences of such negligence. If due care on the part of either at the time of the injury would prevent it, the antecedent negligence of one or both parties is immaterial, except it may be as one of the circumstances by which the requisite measure of care is to be determined. In such a case the law deals with their behavior in the situation in which it finds them at the time the mischief is done, regardless of their prior misconduct. The latter is *incuria*, but not *incuria dans locum injuriae*,— it is the cause of the danger; the former is the cause of the injury. *Metropolitan Railway* v. *Jackson*, 3 App. Ca. 193, 198; *Dublin, &c. Railway* v. *Slattery*, 3 App. Ca. 1155, 1166; *Davey* v. *London, &c. Railway*, 12 Q. B. Div. 70, 76; *Churchill* v. *Rosebeck*, 15 Conn. 359, 363–365.

If a person, who by his carelessness is put in a position perilous to himself and to others, while in that position does all that a person of average prudence could, he is guilty of no wrong towards another who embraces the opportunity negligently to injure him, or who receives an injury which proper care on his part would prevent. It would doubtless be esteemed gross carelessness to navigate the Atlantic in a vessel without a rudder, but if the owner, while sailing his rudderless ship with ordinary care, is negligently run down by a steamer, the latter must pay the damages, and can recover none if it is injured. *Dowell* v. *Steam Navigation Co.*, 5 E. & B. 195; *Haley* v. *Earle*, 30 N. Y. 208; *Hoffman* v. *Union Ferry Co.*, 47 N. Y. 176. If the vessel, by reason of its lack of a rudder, runs upon and injures the steamer, both being in the exercise of ordinary care at the time, the former must pay the damages. He who by his negligence has produced a dangerous situation is responsible for an injury resulting from it to one who is without fault.

If, at the time of the injury, each of the parties, or, in the absence of antecedent negligence, if neither of them could prevent it by ordinary care, there can be no recovery. The comparatively rare cases of simultaneous negligence will ordinarily fall under one or the other of these heads. If the accident results from the combined effect of the negligence of both parties, that of neither alone being sufficient to produce it, proof by the plaintiff that due care on the part of the defend-

ant would have prevented it will not entitle him to recover, because like care on his own part would have had the same effect. If the misconduct of each party is an adequate cause of the injury, so that it would have occurred by reason of either's negligence without the co-operating fault of the other, proof by the plaintiff that by due care he could not have prevented it will not entitle him to recover, because no more could the defendant have prevented it by like care. *Murphy* v. *Deane*, 101 Mass. 464, 465; *Churchill* v. *Holt*, 131 Mass. 67. In each case alike they are equally in fault. To warrant a recovery, the plaintiff must establish both propositions, namely, that by ordinary care he could not, and the defendant could, have prevented the injury. *State* v. *Railroad*, 52 N. H. 528; *Bridge* v. *Grand Junction Railway*, 3 M. & W. 244; *Dowell* v. *Steam Navigation Co.*, 5 E. & B. 195; *Tuff* v. *Warman*, 5 C. B. N. S. 573; *Davey* v. *London, &c. Railway*, 12 Q. B. Div. 70; *Munroe* v. *Leach*, 7 Met. 274; *Lucas* v. *New Bedford, &c. Railroad*, 6 Gray, 64; *Murphy* v. *Deane*, 101 Mass. 455; *Hall* v. *Ripley*, 119 Mass. 135; *Button* v. *Hudson, &c. Railroad*, 18 N. Y. 248; *Austin* v. *N. J. Steamboat Co.*, 43 N. Y. 75; *Barker* v. *Savage*, 45 N. Y. 194; Cool. Torts, 674, 675, and cases cited.

In the comparatively unfrequent cases of the third class, a negligent plaintiff can seldom, if ever, recover. Where both parties are careless, they are usually, if not always, equally in fault; ordinary care on the part of either would prevent the injury. Not being present on the occasion of the accident, neither can, in general, guard against the consequences of the other's negligence. *Blyth* v. *Topham*, Cro. Jac. 158; *Sybray* v. *White*, 1 M. & W. 435; *Williams* v. *Groucott*, 4 B. & S. 149; *Lee* v. *Riley*, 18 C. B. N. S. 722; *Wilson* v. *Newberry*, L. R. 7 Q. B. 31; *Lawrence* v. *Jenkins*, L. R. 8 Q. B. 274; *Firth* v. *Bowling Iron Co.*, 3 C. P. Div. 254; *Crowhurst* v. *Amersham Burial Board*, 4 Ex. Div. 5; *Bush* v. *Brainard*, 1 Cow. 78; *Lyons* v. *Merrick*, 105 Mass. 71; *Page* v. *Olcott*, 13 N. H. 399.

If there are actions for negligence of such a character that the rights of the parties are not determinable by the application of these principles, the present case is not one of them. If, notwithstanding the defendants' negligence, the plaintiffs, by ordinary care, could have prevented the fright of the horse, or its running, after the fright, or, in the absence of ability to do either, if they could have avoided the running upon and injury to Clapp, their misconduct, and not that of the defendants, was the cause of the accident, and they cannot recover. On the other hand, if the plaintiffs' carelessness consisted solely in permitting the horse to be where it was at the time, and ordinary care by the defendants would have prevented its fright, or, if the plaintiffs, by proof of any state of facts competent to be shown under the declaration, can make it appear that at the time of the occurrence they could not, and the defendants could, by such care have prevented the accident, they are entitled to recover. *Demurrer overruled.*

CARPENTER J., IN NIEBOER *v.* DETROIT ELECTRIC RAILWAY.

1901. 128 *Michigan*, 486, pp. 491, 492.[1]

CARPENTER, J. ". . . The law by which it is determined whether or not the contributory negligence of the plaintiff bars recovery is very uncertain. The adjudicated cases are by no means harmonious, and there is an irreconcilable conflict between the principles announced by eminent judges and the text-book writers. It has been stated that the plaintiff cannot recover if the injury complained of would not have occurred without his negligence. It has also been stated that plaintiff's negligence will not bar his recovery if due care on the part of the defendant would have prevented the injury. If the first statement is correct, contributory negligence always prevents a recovery; if the second statement is correct, contributory negligence never prevents recovery. The truth is that the first statement can be correctly applied only in cases of simultaneous negligence, as in the case of an injury to a person while crossing a railway in consequence of his own and the railway company's negligence. The second statement can be correctly applied only in cases of successive negligence, as in the famous *Donkey Case*, of *Davies* v. *Mann*, 10 Mees. & W. 546, where defendant negligently ran into and injured the plaintiff's donkey, which plaintiff had negligently permitted to go unattended on the highway. The test almost universally approved is whether or not plaintiff's negligence is the proximate cause of his injury. If it is, he cannot recover; if it is not, he can. Even this test has been criticised on the ground that the term 'proximate' is misleading. I think this criticism just and important. The word 'proximate' is ordinarily used to indicate the relation between defendant's negligence and the plaintiff's injury. As so used, it has not the same meaning that it has when used to indicate the relation between plaintiff's negligence and plaintiff's injury. To illustrate, suppose in the case of *Davies* v. *Mann*, above referred to, that, as a result of the collision between the cart and the donkey, a third person had been injured; I think all will agree that the owner of the donkey, as well as the owner of the cart, would have been liable. See *Lynch* v. *Nurdin*, 1 Q. B. (N. S.) 29. And we have already seen that the negligence of the owner of the donkey was not so related to the collision as to preclude recovery in a suit by him against the owner of the cart. As used in relation to contributory negligence, the term 'proximate' simply means that in some way the relation between plaintiff's negli-

[1] The opinion of CARPENTER, J., was given in the Circuit Court; and was quoted by MOORE, J., in his dissenting opinion in the Supreme Court. — ED.

gence and his injury is more remote than that between defendant's negligence and the injury." [1]

SHAW, J., IN CORDINER *v.* THE LOS ANGELES TRACTION COMPANY AND THE LOS ANGELES RAILWAY COMPANY.

1907. 4 *California Appellate Decisions*, 480, p. 484.

SHAW, J. Neither of the defendants questioned the right of plaintiff to recover such damages as she had sustained in the collision, but each contended that the other should be held responsible therefor; and with the view of having the jury pass upon the question, the Los Angeles Railway Company asked the court to instruct the jury, in effect, that notwithstanding the negligence of its motorman in driving his car upon the crossing, still if the traction motorman could, after he saw that it was beyond the power of the motorman of the Los Angeles Railway car to avoid the accident, have, by proper care, prevented the collision, then the negligence of the defendant Los Angeles Traction Company was the proximate cause of the injury. In other words, while admitting that plaintiff's injury resulted from the collision due to the joint or concurrent acts of negligence of defendants, she must be confined in her recovery for such damages to a judgment rendered against the defendant who had the "last clear chance" to avoid the collision and neglected to act upon it. Appellant seeks to apply the well-established principle that "he who last has a clear opportunity of avoiding the accident, by the exercise of proper care to avoid injuring another, must do so." *Esrey* v. *S. Pacific Co.*, 103 Cal. 541. This rule is only applicable to cases where the defence is based upon the contributory negligence of plaintiff due to his want of care in placing himself in a position of danger, and where he may, notwithstanding his negligence,

[1] "We shall immediately see, moreover, that independent negligent acts of A and B may both be proximate in respect of harm suffered by Z, though either of them, if committed by Z himself, would have prevented him from having any remedy for the other. Thus it appears that the term 'proximate' is not used in precisely the same sense in fixing a negligent defendant's liability and a negligent plaintiff's disability." Pollock, *Torts*, 6th ed. 447.

". . . In determining whether the cause of the accident is proximate or remote, the same test must be applied to the conduct of the injured party as is to be applied to the defendant. The conduct of the latter cannot be judged by one rule and that of the former by some other rule." — O'BRIEN, J., in *Rider* v. *Syracuse, &c., Co.*, 171 N. Y. 139, p. 154.

An instruction as to the meaning of the word "proximately" intimates "that there is a difference between the meaning of the word when applied to the defendant and when applied to the plaintiff. There is no such difference. Contributory negligence on the part of the plaintiff must bear the same proximate relation to the result as the actionable negligence of the defendant. It need not be the sole cause, and it may contribute but slightly, but it must be a proximate cause in the same sense that the defendant's negligence must be proximate." WINSLOW, J., in *Boyce* v. *Wilbur Lumber Co.*, 119 Wisc. 642, pp. 649–650. — ED.

recover from a defendant, who by the exercise of proper care could have avoided the injury. We are unable to perceive why this rule should apply to plaintiff, who was in no way chargeable, by imputation or otherwise, with negligence; nor are we referred to any authority which supports the proposition. Indeed, all the authorities recognize the right of recovery against either or both of the defendants whose concurring acts of negligence united in producing the injury. 1 Shearman & Redfield on Neg. p. 122; 1 Thompson on Neg. p. 75; *Doeg* v. *Cook*, 126 Cal. 213; *Tompkins* v. *Clay St. Ry. Co.*, 66 Cal. 163; *Pastene* v. *Adams*, 49 Cal. 87.

HUTCHINSON *v.* ST. LOUIS, &c., RAILROAD COMPANY.

1901. 88 *Missouri Appeals*, 376.[1]

APPEAL from St. Louis City Circuit Court.

Plaintiff (respondent) was injured while driving on the track of the street railroad at the crossing of two streets. The car collided with the rear of his wagon. Plaintiff testified that he had been driving for some three hundred yards with the left wheels of his wagon inside the north rail. Defendant's (appellant's) testimony tended to prove that plaintiff did not drive on the track until he had either reached or was near the crossing, and that he then turned and drove onto the track, when the motor car coming up from behind collided with the rear of his wagon.

What is undisputed is, that he did not look back to see if a car was coming before attempting to cross, nor, according to his own testimony, after he drove onto the track three hundred yards or more to the east. He drove very slowly. There was testimony tending to show the motorneer in charge of the car was watching a train on the railroad just south of Manchester avenue, which inattention prevented him from observing plaintiff's perilous position until the car was within twenty or thirty feet of the wagon. He was required, by a city ordinance, to be watching the track.

The evidence as to the warning of the car's approach was conflicting.

The plaintiff was entitled to the use of the entire street, and, therefore, was not a trespasser, while the defendant was entitled to the right of way.

Failure to signal the car's approach was omitted from the instructions. The only ground of recovery submitted to the jury was alleged negligence of the defendant's motorneer in not using ordinary care to avoid injuring plaintiff after he knew, or by the proper care might have known, the latter was in a dangerous position. One instruction was given that plaintiff was guilty of contributory negligence if he failed

[1] Statement abridged. Arguments omitted. — ED.

to look back at reasonable intervals to see if a car was coming and to get off the track if he saw one. This was practically telling them he was actually negligent, for he admitted he did not look back.

McKeighan, Barclay & Watts, and *Robert A. Holland, Jr.*, for appellant.

John E. Bowcock and *G. N. Fickeissen* for respondent.

GOODE, J. The general principle on which the case was referred to the jury, commonly styled the humane doctrine, is well supported by authorities. It is accepted in some form in most of the state and federal jurisdictions. So far as this court is concerned, the rule is no longer debatable. All uncertainty about it being a substantive part of the law of torts has been set at rest by recent deliberate pronouncements of the Supreme Court. The authority of the rule is not impugned by the learned counsel for the appellant, who only insist that it is inapplicable to the cause in hand on account of the plaintiff's clear contributory negligence which continued to the moment of the collision. This contention requires a brief examination of some cases in which the doctrine has been applied. They divide into two classes and the disputation which has raged over it has been on the border line between the two. As enforced in one class, the rule has always seemed to the writer to be a phase of the doctrine of proximate cause, consistent with the theory of the entire law of negligence and without which the system would be incomplete. These instances are where the plaintiff's negligent act was detached from the injury so that the defendant's want of care was the sole active agency in inflicting it. When an accident happens under such circumstances, the plaintiff ought not to be refused a recovery because, though remiss, his fault does not contribute to the injury. Illustrations of this class of cases are numerous in the books, beginning with the one from which all the others proceeded. *Davis* v. *Mann*, 10 Mees. & W. 546, where the plaintiff had carelessly fettered his beast in the highway and the defendant's servant drove over him. It is manifest that the original negligence of the owner was separated from the injury, which was proximately caused solely by the defendant's tort. Another apt illustration is found in the Reardon case (114 Mo. 384), where the plaintiff carelessly went on the railway track and fell in endeavoring to get off when he saw a train coming. It was held that if the engineer failed to employ ordinary care to stop the train when he saw him prostrate, the company was liable. The same ruling has been made in actions where plaintiffs had fallen asleep on tracks or become fastened in cattle guards or switches or where the person hurt was a child or otherwise not of full legal capacity (*Gabel* v. *Railway Co.*, 60 Mo. 475). The doctrine is exclusively met with, so far as our reading has shown, in controversies arising from injuries due to violent impacts and collisions. The above instances exemplify its use in such cases where, properly expounded, it does not clash with the doctrine of contributory negligence, though some of the applications made have laid it open to that charge. The reconciliation and har-

monious working of the two rules may be achieved by considering closely whether the defendant's carelessness was alone the proximate cause of the injury. If only the defendant's was the proximate cause, the plaintiff, while guilty of negligence, was not guilty of contributory negligence; his failure to use care did not proximately contribute to the mischief. Time elapsed between his wrongful act and the injury, during which the wrongful act of the defendant supervened or entered, as a separate agency, which, by its own independent action, wrought the unfortunate result. If, however, the plaintiff's want of care continues to the instant of the accident, or so near the instant as to be immediately influential in producing it, he is as much to blame as the defendant, and if the latter is compelled to compensate him, the theory of the law of negligence is thus far abandoned. When it is deemed expedient to allow a recovery under such circumstances, it must be done as a measure of public policy. The rule then becomes, in fact, an exception to the law of contributory negligence, as was said in *Kelly* v. *Railway Co.*, 101 Mo. 67. The real basis of it, as it obtains in many jurisdictions in respect to injuries by cars and locomotives when the injured individual was negligent to the very instant of the collision, is to be sought, on an ultimate analysis, in its supposed necessity for the public security. The guilt of the plaintiff is excused, while that of the defendant is punished. In such instances, its administration in cases of injuries by cars and engines is attended with serious difficulty, viz.: determining when the employees of the railway company may be justly said to have had notice that the injured party was in a position of danger. Persons frequently remain on railway tracks when a car or train is approaching, until it would be impossible to stop it in time to avoid striking them, but easily get off themselves in time. Accustomed to take care of their safety where cars are constantly moving, they grow dexterous in avoiding them and run risks. Engineers and motormen have a right to presume an individual travelling on the track will leave it, and to act on that presumption until his situation becomes alarming. *Riley* v. *Railway Company*, 68 Mo. App. l. c. 661. Just when this happens must often be largely conjectural, which circumstance weighs heavily with many against the rule in question.

The doctrine in its wider scope prevails in this State. The plaintiff may recover, notwithstanding his negligence directly contributed to his hurt, if the defendant by ordinary care could have prevented the accident. In the Morgan case (60 S. W. Rep. 195), where a recovery was sustained, this language is spoken: "There can be no doubt, under the evidence, that the death of the plaintiff's husband resulted from the negligence of the defendant's servants in charge of the train, *and the negligence of the deceased himself contributing thereto.*" Similar expositions have been made in many other cases. *Schmidt* v. *R'y Co.*, 50 S. W. 921; *Klockenbrink* v. *Railway Co.*, 81 Mo. App. 351; *Cooney* v. *Railway Co.*, 80 Mo. App. 226. They seem in conflict with the opinion

in *Hogan* v. *R'y Co.*, 150 Mo. 36. We must follow the latest controlling decision. The Morgan case was decided in banc.

In view of the strong utterances to be found in the foregoing authorities, it is useless to descant on the wisdom or fallacy of the rule, to explore its foundation, extol its justice, or regret its hardship. Our unmistakable duty is to enforce it as we would any other part of the law. The present case differs in no material respect, calling for its application, from the Morgan or Cooney cases, supra, which became therefore controlling precedents. The Morgan case is stronger because there the engineer did not see the deceased, who was flagrantly careless, to the time the engine struck him; here the motorman did not see the plaintiff. The court below did not err in refusing an instruction to find the issue for the defendant, but rightly submitted them. This practically disposes of the case.

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Judgment affirmed.

GRAY, J., IN INLAND, &c., CO. *v.* TOLSON.

1891. 139 *U. S. Supreme Court*, 551, p. 558.

GRAY, J. The other instruction was in these words: "There is another qualification of this rule of negligence, which it is proper I should mention. Although the rule is that, even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident; yet the contributory negligence on his part would not exonerate the defendant, and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence."

The qualification of the general rule, as thus stated, is supported by decisions of high authority, and was applicable to the case on trial.

LAMAR, J., IN GRAND TRUNK R. CO. *v.* IVES.

1892. 144 *U. S. Supreme Court*, 408, p. 429.

LAMAR, J. Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to this qualification, which has grown up

in recent years (having been first enunciated in *Davies* v. *Mann*, 10 M. & W. 546), that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence.

[The learned judge then states the instructions given to the jury as to the question of the alleged contributory negligence of the deceased; and on page 431 says: If they are open to any criticism at all, it is that they were more favorable to the defendant than it had the right to demand, under the rules above stated, since they enabled the defendant to be relieved from any liability in the case, if the deceased had been guilty of contributory negligence, even though it might, by the exercise of ordinary care and prudence, have averted the results of such negligence.]

GILBERT, J., IN NORTHERN PACIFIC RAILWAY COMPANY *v.* JONES.

1906. 144 *Federal Reporter*, 47, pp. 50, 51, 52.

GILBERT, J. . . . The defendant in error was a miner of the age of 34 years, and was in the full possession of his senses. According to his own testimony, he walked upon the railroad track a distance of more than half a mile without once looking back or stopping to listen for an approaching train. In so doing, it must be held that he was guilty of gross negligence, which, irrespective of negligence in the failure of the engineer to discover him on the track, is sufficient to bar his right of recovery. It was no excuse for his failure to take such precautions that the wind was blowing in his face, or that the noise of a waterfall may have deadened the sound of an approaching train. Those circumstances only rendered the use of his senses the more imperative. It was his duty continually to exercise vigilance.

. . . . . .

On the authority of *Inland & Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551–558, 11 Sup. Ct. 653, 35 L. Ed. 270; *Grand Trunk Ry. Co.* v. *Ives*, 144 U. S. 408–429, 12 Sup. Ct. 679, 36 L. Ed. 485, and *Bogan* v. *Carolina Central Ry. Co.*, 129 N. C. 154, 39 S. E. 808, 55 L. R. A. 418, the defendant in error invokes the doctrine that the contributory negligence of the party injured will not defeat the action, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence. In the first of these decisions, the doctrine was applied in a case where the plaintiff, a wharfinger, was standing with his foot between the timbers of a wharf, to deliver freight to a vessel which was about to make a landing there, and which struck the wharf with

such force as to crush his foot. But the court held that the doctrine was applicable, for the reason that the jury might well have been of opinion that, while there was some negligence on the plaintiff's part in standing where and as he did, yet the officers of the boat knew just where and how he stood, and might have avoided injuring him, if they had used reasonable care to prevent the steamboat from striking the wharf with unusual and unnecessary violence. In the Ives Case, the plaintiff's intestate was killed while attempting to cross a railroad track. There was evidence of negligence on the part of the railroad company. On the part of the plaintiff's intestate there was no evidence as to what precaution he took before placing himself in the place of danger, except that, at a distance of about seventy-six feet from the track, he stopped several minutes, presumably to listen for trains; that while there a train passed; and that, soon after it had passed, and while the noise caused by it was still quite distinct, he proceeded across the track and was struck by another train. The court held that the question of contributory negligence of the plaintiff's intestate was properly left to the jury, as one to be determined under all the circumstances of the case, but incidentally proceeded to affirm the rule above quoted, citing *Davies* v. *Mann*, 10 M. & W. 546 *Inland & Seaboard Coasting Co.* v. *Tolson*, and other cases. There was no evidence in the Ives Case that the plaintiff's intestate was seen by those who were managing the train in time to have avoided the accident. The court, in that case, however, reaffirmed the rule that a traveller, on going upon a railroad track, ought to make vigilant use of his senses of sight and hearing, and listen for signals, and look in the different directions from which a train might come, and said: —

"If by neglect of this duty he suffers injury from a passing train, he cannot recover of the company, although it may itself be chargeable with negligence, or have failed to give the signals required by statute, or be running at the time at a speed exceeding the legal rate."

It cannot be contended that in the Ives Case the Supreme Court intended to lay down the broad rule that no contributory negligence of the party injured will defeat his right to recover, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of that negligence. To so hold would be to destroy the whole doctrine of contributory negligence. As applied to the present case, it would mean that the plaintiff in error was bound to know that the defendant in error was upon its track, and that he would not step aside in time to avoid the train. Such is not the doctrine of cases such as *Northern Pacific Railroad* v. *Freeman* and the other decisions which we have cited above. The doctrine of "the last clear chance," so invoked by the defendant in error, originated in *Davies* v. *Mann*, in which it was held that the plaintiff's want of ordinary care in that case did not constitute contributory negligence, because it was a remote cause or mere condition of the injury, and did not proximately contribute to it, and because the negligence of the

defendant arose subsequently to that of the plaintiff, and the latter's negligence was so obvious as to have been discoverable by the exercise of ordinary care. That doctrine has no application to a case where the plaintiff voluntarily places himself in a place of danger from which he has present means of escape, and continues there without exercising precautions which an ordinarily prudent man would exercise. We have nothing here to do with the law applicable to a case where the injured person is found in a place of danger, as upon a railroad trestle, from which he is powerless to extricate himself on the approach of a train, and where his situation is discovered, or ought to have been discovered, by those in charge of the train.

. . . . . .

JONES *v.* CHARLESTON, &c., RAILWAY COMPANY.

1901. 61 *South Carolina*, 556.[1]

ACTION under statute by administrator of Susan V. Jones to recover for her death. Mrs. Jones was killed by a train backing down upon her while she was walking on the railroad track. Plaintiff's evidence tended to show that the track at that place had been accustomed to be used by the public as a walkway, with the knowledge and acquiescence of the defendant company. Mrs. Jones, when killed, was on a trestle. The train was backing down behind her, at a speed of from five to ten miles an hour. There was evidence on plaintiff's part that no bell was rung, no whistle blown, no warning given of the approach of the train; also that there was no look-out on the train, and no rear-end lights.

Defendant requested the following instruction (No. 6) :—

"Even if the defendant was guilty of negligence in the backing of its train, and such negligence was a proximate cause of the injury, if the jury also believe that the said Susan V. Jones showed a want of ordinary care in walking down the track that night, under all the circumstances, and such carelessness was a proximate cause of the injury, she was guilty of contributory negligence, and the plaintiff would not be entitled to recover."

The judge qualified this instruction by adding: —

"If the deceased, Mrs. Jones, was guilty of negligence in acting as you may find from the testimony that she acted, and if her conduct, her negligence, together with the negligence of the railroad company, contributed to her injury as the proximate cause, then the railroad company would not be responsible, unless the railroad company could have avoided injuring her notwithstanding her negligence."

[1] Statement condensed. Arguments omitted. Only part of the opinion is given. — ED.

The judge charged the jury, in accordance with plaintiff's ninth request, as follows: —

"Contributory negligence is a matter of defence, and must be proved by defendant by a preponderance of the evidence; but unless the contributory negligence was the proximate cause of the accident, and if in spite of such contributory negligence the accident could have been avoided by the use of ordinary care on the part of the defendant, then plaintiff is still entitled to recover."

Verdict for plaintiff and judgment thereon. Defendant appealed.

B. F. Whitner and *S. J. Simpson*, for appellant.

Bonham & Watkins and *Quattlebaum & Cochran*, for appellee.

JONES, J. . . . The testimony being undisputed that Mrs. Jones, plaintiff's intestate, was walking down the railroad track at the time of the injury, the defendant was entitled to have the sixth request to charge above mentioned in the tenth exception submitted to the jury as entirely correct. The remarks by the court down to the clause, "unless the railroad company could have avoided injuring her notwithstanding her negligence," were not improper nor inconsistent with the request, but the addition of such qualification was erroneous and wholly inconsistent with the well-settled principles governing contributory negligence. The same error was made in the charge excepted to in the eleventh exception above, when the court instructed the jury, "but unless the contributory negligence was the proximate cause of the accident, and if in spite of *such* contributory negligence (that is, negligence which contributed as a proximate cause), the accident could have been avoided by the use of ordinary care on the part of the defendant, then the plaintiff is still entitled to recover." The charge destroyed the defence of contributory negligence. In *every* case where there is contributory negligence, the defendant could have avoided the injury by ordinary care, for the simple reason that there can be no such thing as contributory negligence unless the defendant be negligent. The error complained of is the same error which was condemned in *Cooper* v. *Ry. Co.* 56 S. C. 94. The law in this state is settled that contributory negligence as defined in Cooper's case, *supra*, to *any* extent, will *always* defeat plaintiff's recovery, unless the injury is wantonly or wilfully inflicted; for the law cannot measure how much of the injury is due to the plaintiff's own fault, and will not recompense one for injury resulting to himself from his own misconduct. The objection to the charge is that it instructed the jury that although plaintiff's negligence contributed to her injury as a proximate cause, she could recover if the defendant by ordinary care could have avoided the injury. Is it not manifest that such a rule would abolish contributory negligence as a defence? The qualifying terms, "unless the railroad company could have avoided injuring her notwithstanding her negligence," would necessarily mislead a jury; for they would at once say the railroad company could have avoided the injury by not being negligent in the manner alleged in the complaint, by having suitable rear end lights, by a reasonable

lookout, by loud warning of the train's approach, by running at such slow speed as to enable any one warned to get off the track; and then utterly ignore the defendant's plea and evidence of contributory negligence, because of the instruction that plaintiff, notwithstanding her negligence which proximately caused her injury, could still recover, if the defendant could have avoided the injury. The jury ought to have been instructed without qualification, that if plaintiff was negligent and that negligence contributed as a proximate cause to her injury, she could not recover, unless the injury was wantonly or wilfully inflicted.

The judgment of the Circuit Court is reversed, and the case remanded for a new trial.

GAHAGAN *v.* BOSTON & MAINE RAILROAD.

1901. 70 *New Hampshire*, 441.[1]

PLAINTIFF was struck by a train while attempting to use a crossing provided by the Railroad Company for persons having business with a manufacturing company. From a point twenty-two feet from the nearest rails there was an unobstructed view of the track in the direction from which the train came. The accident happened near noon on a bright and clear day. Generally the engine bell was rung, while the whistle was sometimes sounded, for this crossing. Plaintiff knew it was usual to ring the bell. In this instance a danger whistle was sounded at, or immediately before, the time when plaintiff was struck; but there was evidence tending to prove that no other warning of the approach of the train was given. Plaintiff testified that he did not look or listen for an approaching train; and that he did not look because he expected to hear the bell or whistle if one was coming. The engineer testified that, when about one hundred and fifty to two hundred feet from the crossing, he saw plaintiff approaching the track; and that he kept watch of plaintiff until he got within a few feet of the track, when he whistled.

A nonsuit was ordered, subject to exception.

Eastman & Hollis, for plaintiff.

John Kivel and *James A. Edgerly*, for defendants.

PARSONS, J. . . . It is urged that the plaintiff relied upon the ringing of the bell, and that the failure to give the warning signals (of which there was some evidence which must here be taken to be true) excused him from the exercise of vigilance. Though the plaintiff testified that he did not look to see if a train was approaching because he expected to hear the whistle or bell if there was, it cannot be claimed that he was consciously at the time placing any reliance thereon, for he further testifies that he had no thought of a train coming and did

[1] Statement abridged. Only part of opinion is given. — ED.

not listen for the bell. As his counsel state in their brief, "There was no positive effort, no conscious 'harking' or 'listening,' to ascertain if the train was coming." But assuming that it might be found as a fact that he did rely on the awakening of his consciousness by the performance of the railroad's duty of warning, the failure of the defendants to perform their duty did not release him from his. The obligation to use care was equally imposed upon each. If the defendants' negligence excused the plaintiff from his duty of care, the plaintiff's negligence with equal reason would excuse the defendants. If the plaintiff had the right to assume the defendants would perform their duty, and, relying thereon, approach the crossing without exercising care, the defendants had the right to assume that the plaintiff would perform his duty, and omit the warning of bell and whistle. The duty of care rested on each equally. If neither performed that duty both are in fault, and neither can recover of the other. The collision in this case resulted, it may be, because neither party performed their duty. If either had, there might and probably would have been no accident. The rights and liabilities of the parties consequent upon their acts resulting in the collision are not affected by the fact that subsequently one is plaintiff and the other defendant in a suit growing out of the collision. Their several responsibility is fixed at the time by their acts or failure to act. A suit by the engineer against Gahagan for personal injury resulting from the collision would present precisely the same legal question as that we now have. It would hardly be urged that the engineer was not guilty of contributory negligence in failing to ring the bell because he relied upon Gahagan's performance of his duty of stopping and allowing the train to go by. The negligence of neither is an excuse for concurrent want of care in the other, because for an injury resulting from the concurrent negligence of both neither can recover. *Nashua Iron and Steel Co.* v. *Railroad*, 62 N. H. 159, 163.

The rule is laid down in *Railroad Co.* v. *Houston*, 95 U. S. 697, 702, also a crossing case, as follows: "The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part."

. . . . . .

It is not claimed that after the plaintiff stepped upon the track almost immediately in front of the approaching train the defendants could have prevented the injury, or that the employees in charge of the train, when the danger thus became imminent, did not do all that could be done to prevent the collision. At any time before this the plaintiff could have avoided the collision. There was no moment when the defendants could, while the plaintiff could not, have prevented the injury. The plaintiff's act in stepping upon the track, without precaution to ascertain whether he could safely do so, was the

last act in point of time in the causation producing the injury. As there was no evidence upon which it could reasonably be found that the plaintiff's action in this respect was the exercise of care, he cannot recover unless upon the evidence some negligent act or omission of the defendants' employees could be found to be the sole proximate cause of the injury.

. . . . . .

The plaintiff's negligent occupation of the track did not authorize the defendants to run upon and injure him, if by care they could have avoided it. Ordinarily, the negligent act or omission which fails to avoid the consequences of the plaintiff's negligence is the last act in time in the series leading to the injury. Such was the case in the cases cited; the negligent occupation of the track by the plaintiffs preceded the negligence of the defendants in failing to observe and guard against the danger so produced. But as ordinary care may require vigilance to guard against a dangerous situation reasonably to be apprehended, as well as actually imminent, it cannot always follow that the last negligent act in point of time is necessarily the proximate cause of the injury. If the engineer knew or ought to have known that the plaintiff's negligence would place him upon the crossing when the train reached it, the engineer was equally bound to avoid the collision as if he saw the plaintiff actually on the track. The question is one of evidence merely. The mere fact that the person when first seen is on the track is not decisive. If a person on foot is seen crossing the track at such distance ahead that it could not reasonably be apprehended that the train would reach him in this position, the engineer would not be in fault for not preparing to avoid a danger not reasonably to be expected. In the present case there is evidence that when the plaintiff was first seen by the engineer the collision could have been prevented. If the engineer knew or ought to have known then that the plaintiff would be upon the crossing when the train reached it, and could have avoided the collision, his failure to do so is the proximate cause of the injury.

As there was evidence the collision might then have been prevented by him, the sole remaining question is whether upon the evidence reasonable men might find the engineer ought then to have foreseen the plaintiff's negligence. The bare fact that the plaintiff was seen approaching the track is not sufficient to authorize such a finding. If it were, the rule heretofore laid down and found to be approved by the authorities and the reason of the case, that it is the duty of the highway traveller to stop and allow the train to pass, would be reversed. It would become the duty of the train to stop and wait for the person on foot to go by. This would be unreasonable, impracticable, and put an end to the modern system of rapid transportation demanded by the public, and to effectuate which railroads are authorized by the state.

"The company's servants may ordinarily presume that a person apparently of full age and capacity, who is walking on the track at

some distance before the engine, will leave it in time to save himself from harm; or if approaching the track, that he will stop if it becomes dangerous for him to cross it. This presumption will not be justified under some circumstances, as when the person who is on the track appears to be intoxicated, asleep, or otherwise off his guard." Pierce R. R. 331; 2 Shearm. & Red. Neg., *s.* 483; *Chicago, etc. R. R.* v. *Lee*, 68 Ill. 576, 581; *Terre Haute, etc. R. R.* v. *Graham*, 46 Ind. 239, 245; *Lake Shore, etc. R. R.* v. *Miller*, 25 Mich. 274, 278, 280; *Boyd* v. *Railway*, 105 Mo. 371, 381, 382. The presumption is founded upon the general principle of right acting and the instinct of self-preservation. *Huntress* v. *Railroad*, 66 N. H. 185; *Lyman* v. *Railroad*, 66 N. H. 200; 2 Thomp. Neg. 1601.

The case discloses no evidence apparent to the engineer taking the present case out of the rule.

. . . . . .

Aside from the plaintiff's own statement and the fact of the subsequent collision, the case contains no evidence that the plaintiff, when seen by the engineer approaching the crossing, was not alert to the situation, or tending to produce a belief that he would voluntarily rush into danger without care. Until he stepped upon the track his only danger consisted in the fact of his mental obliviousness to his duty of taking care. So defining his danger, the claim of his counsel, that if the engineer knew the plaintiff's danger he could have avoided the injury and is in fault for not doing so, is sound; but to submit to the jury the question of fact whether the engineer ought to have known the *status* of the plaintiff's mind in season to have prevented the accident, not only in the absence of evidentiary facts tending to prove such knowledge but in the face of all the facts open only to a contrary inference, would be a violation of the familiar and elementary rule that in judicial trials facts are to be found upon evidence, not conjecture. *Deschenes* v. *Railroad*, 69 N. H. 285.

The evidence upon which counsel mainly rely, tending to show that when seen by the engineer Gahagan's face was not turned toward the train and that his appearance did not indicate whether he saw the train or not, does not tend to establish that he proposed to rush carelessly into known danger, or that he would go upon the track without care to ascertain if a train was approaching. That Gahagan knew the crossing, its danger, and his approach to it, was conceded. Hence, in the face of this admitted fact, although this evidence may have some tendency to prove the contrary, the jury could not find that Gahagan did not know he was approaching a place of danger, or that the engineer ought to have inferred a fact which it is conceded did not exist. As there is no evidence that the defendants ought to have known the plaintiff's danger in season to have avoided the results of his negligence, they cannot be found guilty of negligence for not doing so.

. . . . . .

Exceptions overruled.

KEITH, P., IN NORFOLK & W. R. CO. *v.* DEAN'S ADM'X.

1907. 107 *Virginia*, 505, pp. 506, 507, 513.

KEITH, P. The Circuit Court . . . rests the case solely upon the second count in the declaration, in which the case presented is that, after it became apparent to the crew in charge of defendant company's train that intestate of plaintiff was on the track in front of the engine, that he was unconscious of his danger, and would take no measures to protect himself, the crew failed to use any measure to prevent the accident. Such being the issue to be determined, it is needless to consider so much of the evidence as relates to the use of the track as a public passway, or as to whether or not the person injured was a licensee or a trespasser. He was a human being, and when his dangerous position was seen and known, and that he himself was unconscious of his peril, and would take no measures for his own protection, it became the duty of the railroad company to do all that could be done consistent with its higher duties to others to save him from the consequences of his own act, regardless of whether he was guilty of contributory negligence or not. *Seaboard & Roanoke R. Co.* v. *Joyner's Adm'r*, 92 Va. 355, 23 S. E. 773.

This being the narrow issue to be decided, it becomes necessary to consider the evidence bearing upon it with care. . . .

[The learned judge then considered the testimony. He found that there was no failure of duty on the part of the train men; and he *held* that the demurrer to the evidence should have been sustained. He quoted, with approval, the following statements of the law.]

In *N. & W. Ry. Co.* v. *Harman*, 83 Va. 577, 8 S. E. 258, it is said that "if a person seen upon the track is an adult, and apparently in the possession of his or her faculties, the company has a right to presume that he will exercise his senses and remove himself from his dangerous position; and if he fails to do so, and is injured, the fault is his own, and there is, in the absence of wilful negligence on its part, no remedy against the company for the results of an injury brought upon him by his own recklessness."

. . . . . .

In *Rangeley* v. *Southern Ry. Co.*, 95 Va. 715, 30 S. E. 386, it is said that a railroad company has the right to assume that a grown person seen on its track will get out of the way of an approaching train, and the company is not liable unless it is shown that after the company, in the exercise of ordinary care, could have discovered that he was not going to get off the track, it could have avoided the injury.

O'KEEFE, ADM'X, *v.* CHICAGO, &c., RAILROAD COMPANY.

1871. 32 *Iowa*, 467.

APPEAL from Polk District Court.

Action by an administratrix to recover damages for the death of her husband, Dennis O'Keefe, alleged to have been killed by being run over on the defendant's road, through the negligence of the defendant's agents and employees. Defence in denial, and also that the death was caused by the drunkenness and negligence of the plaintiff's intestate. There was a jury trial, resulting in a verdict and judgment for plaintiff for $1000. The defendant appeals.

Withrow & Wright for appellant.

Finch & Rivers for appellee.

COLE, J. [Omitting statement of evidence.] After the evidence was closed, the defendant asked the court to instruct the jury as follows: "If you are satisfied from the evidence that Dennis O'Keefe, plaintiff's intestate, was, a short time before the alleged injury, in a state of intoxication; that in such condition he went upon defendant's railroad and laid himself down upon the track, or fell down unable to support himself because of such intoxication; that remaining in that condition a passing train crushed one of his legs; that after the injury he was yet under the influence of intoxicating liquors drank before the injury; that the injured limb was amputated and death ensued, you will find for the defendant, unless you further find from a preponderance of the evidence that defendant or its agents had knowledge that he was thus lying in time to prevent the accident," to which the court added, and then gave it, "*or, could have known with the exercise of ordinary caution.*" This modification was excepted to at the time, and is now assigned as error.

The well-established law of this state is, that in an action to recover damages for the negligent act of the defendant, the plaintiff will not be entitled to recover if his own negligence contributed directly to the injury. In other words, this court recognizes and applies the doctrine of "contributory negligence," and not the doctrine of "comparative negligence." The latter doctrine obtains only in Illinois and Georgia, while the former obtains in the other states, and also in the Federal courts. The modification complained of ignored the doctrine of contributory negligence, and substantially told the jury that plaintiff might recover without regard to his negligence, if the defendant could have prevented the injury with the exercise of ordinary caution. The doctrine of the modification goes even farther than that of comparative negligence; for, by the latter, a plaintiff can only recover when he shows the defendant's negligence to have been greater, by comparison, than his, while by the modification the plaintiff might recover if the defendant did not exercise ordinary caution, although

the plaintiff's intestate may have been guilty of a much greater negligence in laying himself down, in a condition of intoxication, near to or upon the track. A similar modification was made to the second instruction. In each there was error.

Reversed.

PICKETT *v.* WILMINGTON, &c., RAILROAD COMPANY.

1895. 117 *North Carolina*, 616.[1]

AVERY, J. The most important question presented by the appeal is whether the court erred in refusing to instruct the jury that if the plaintiff's intestate deliberately laid down upon the track and either carelessly or intentionally fell asleep there, the defendant was not liable, unless the engineer actually saw that he was lying there in time, by the reasonable use of appliances at his command, to have stopped the train before it reached him.

. . . . . .

In *Gunter* v. *Wicker*, 85 N. C. 310, this court gave its sanction to the principle first distinctly formulated in *Davies* v. *Mann*, 10 M. & W. (Ex.) 545, that "Notwithstanding the previous negligence of the plaintiff, if at the time the injury was done it might have been avoided by the exercise of reasonable care and prudence on the part of the defendant, an action will lie for damages." This doctrine was subsequently approved in *Saulter* v. *Steamship Co.*, 88 N. C. 123; *Turrentine* v. *Railroad*, 92 N. C. 638; *Meredith* v. *Iron Co.*, 99 N. C. 576; *Roberts* v. *Railroad*, 88 N. C. 560; *Farmer* v. *Railroad*, *Ibid.* 564; *Bullock* v. *Railroad*, 105 N. C. 180; *Wilson* v. *Railroad*, 90 N. C. 69; *Snowden* v. *Railroad*, 95 N. C. 93; *Carlton* v. *Railroad*, 104 N. C. 365; *Randall* v. *Railroad*, 104 N. C. 108; *Bullock* v. *Railroad*, 105 N. C. 180, and it was repeatedly declared in those cases that it was negligence on the part of the engineer of a railway company to fail to exercise reasonable care in keeping a lookout not only for stock and obstructions but for apparently helpless or infirm human beings on the track, and that the failure to do so supervening after the negligence of another, where persons or animals were exposed to danger, would be deemed the proximate cause of any resulting injury.

. . . . . .

[As to argument for defendant.] But the reasons and the authorities relied upon emanate generally from courts which hold that both persons and animals upon a track are trespassers and entitled to consideration only where actually seen in time to save them. . . .

It cannot be denied that, in a number of the states which have adopted the doctrine of *Davies* v. *Mann*, it has also been held that both man

[1] Statement omitted, also a large part of opinion.— ED.

and beast were trespassers when they went upon a railway track and except at public crossings or in towns it was not the duty of the engineer to exercise care in looking to his front with a view to the protection of either. Where the law does not impose the duty of watchfulness it follows that the failure to watch is not an omission of duty intervening between the negligence of the plaintiff in exposing himself and the accident, unless he be actually seen in time to avert it. The negligence of the corporation grows out of omission of a legal duty and there can be no omission where there is no duty prescribed.

. . . . . .

We are of opinion that, when by the exercise of ordinary care an engineer can see that a human being is lying apparently helpless from any cause on the track in front of his engine in time to stop the train by the use of the appliances at his command and without peril to the safety of persons on the train, the company is liable for any injury resulting from his failure to perform his duty. If it is the settled law of North Carolina (as we have shown) that it is the duty of an engineer on a moving train to maintain a reasonably vigilant outlook along the track in his front, then the failure to do so is an omission of a legal duty. If by the performance of that duty an accident might have been averted, notwithstanding the previous negligence of another, then, under the doctrine of *Davies* v. *Mann*, and *Gunter* v. *Wicker*, the breach of duty was the proximate cause of any injury growing out of such accident, and where it is a proximate cause the company is liable to respond in damages. Having adopted the principle that one whose duty it is to see does see, we must follow it to its logical results. The court committed no error of which the defendant could justly complain in stating the general rule which we have been discussing.

. . . . . .

DYERSON *v.* UNION PACIFIC R. R. CO.

1906. 74 *Kansas*, 528.[1]

PLAINTIFF sued for damages caused by being struck by the tender of an engine.

Plaintiff, an employee of the R. R. Co., had occasion to cross the track. As he was about to step upon the track, he was struck by the tender of a locomotive which was backing east at the rate of fifteen or twenty miles an hour without giving a signal of its approach and without keeping a lookout along the track. The track was straight for a quarter of a mile west. It was a clear day, and there was nothing to have prevented the plaintiff from seeing the engine and tender if he had looked.

[1] Statement abridged. Part of opinion omitted. — ED.

At the trial, the court rendered judgment against plaintiff upon his petition and preliminary statement to the jury which disclosed the above facts. Plaintiff brought error.

E. L. Fischer, C. F. Hutchings, and *S. D. Hutchings,* for plaintiff in error.

Nelson H. Loomis, Robert W. Blair, and *Henry A. Scandrett,* for defendant in error.

MASON, J.

. . . . . .

Finally it is contended in behalf of the plaintiff that, even admitting his own want of care to have been such as would ordinarily bar a recovery, still he had a right to submit to the jury the question whether the employees in charge of the engine by the use of reasonable diligence could have discovered his negligence in time to avert the accident, and that an affirmative answer would have entitled him to a verdict.

. . . . . .

In a number of cases it has been held that if the engineer by the exercise of reasonable diligence could have learned that danger was imminent but did not do so, the liability of the company will be determined in all respects as though he had in fact become aware of it, the constructive knowledge being apparently deemed the equivalent of actual knowledge. It is difficult or impossible to reconcile the decisions upon this and related questions, or to derive from them any generally accepted statement either of principle or result. Many of them are collected and discussed in chapter ix of volume i of Thompson's Commentaries on the Law of Negligence, especially in sections 222 to 247.

There seems, however, to be no sufficient reason why the mere fact that a defendant is negligent in failing to discover a plaintiff's negligence, or his danger, should in and of itself exclude all consideration of contributory negligence. Take the not unusual situation of a train being negligently operated, let us say by being run at too high a speed and without proper signals of warning being given. Now, any one injured as a result of such negligence has *prima facie* a right to recover. But, if his own negligence has contributed to his injury, then ordinarily his right is barred. How is the situation altered if the railroad employees add to their negligence in regard to speed and signals the negligence of failing to keep a sufficient lookout? The negligence is of the same sort; and, if the contributory negligence of the person injured prevents a recovery when but the two elements of negligence are present, consistency requires that it should have the same effect although a third element is added. If in the present case the plaintiff was entitled to recover in spite of his own negligence it must be because the order of its occurrence with respect to that of the defendant made the latter the proximate cause of the injury. This indeed is his contention, and to support it reliance is placed upon the

following text, which was quoted with approval in *Railway Co.* v. *Arnold*, 67 Kan. 260, 72 Pac. 857, and the substance of which is to be found also in volume xx of the American and English Encyclopædia of Law, at page 137: —

"And upon the principle that one will be charged with notice of that which by ordinary care he might have known, it is held that if either party to an action involving the questions of negligence and contributory negligence should, by the exercise of ordinary care, have discovered the negligence of the other, after its occurrence, in time to foresee and avoid its consequences, then such party is held to have notice; and his negligence in not discovering the negligence of the other, under such circumstances, is held the sole proximate cause of a following injury. (7 A. & E. Encycl. of L. 387.)"

This may be accepted as a correct statement of a principle of universal application, according with both reason and authority, provided the words "after its occurrence" be interpreted to mean after the person concerned had ceased to be negligent. The rule that under the circumstances stated the neglect of one party to discover the omission of the other is to be held to be the sole proximate cause of a resulting injury is not an arbitrary but a reasonable one. The test is, What wrongful conduct occasioning an injury was in operation at the very moment it occurred or became inevitable? If just before that climax only one party had the power to prevent the catastrophe, and he neglected to use it, the legal responsibility is his alone. If, however, each had such power, and each neglected to use it, then their negligence was concurrent and neither can recover against the other. As is said in the paragraph from which the foregoing quotation is made, "it is only when the negligence of one party is subsequent to that of the other that the rule can be invoked." In a note printed in volume ii of the supplement to the American and English Encyclopædia of Law, at page 64, many recent cases are cited bearing on the subject, and it is said: —

"This so-called exception to the rule of contributory negligence (*i. e.*, the doctrine of 'the last clear chance') will not be extended to cases where the plaintiff's own negligence extended up to and actually contributed to the injury. To warrant its application there must have been some new breach of duty on the part of the defendant subsequent to the plaintiff's negligence."

In the present case it may be granted that the negligence of the plaintiff began when he walked between the track and the ice-box on the way to get the bucket, and that the employees in charge of the engine were themselves negligent in not discovering this negligence on his part and the peril to which it exposed him, and taking steps to protect him. But his negligence as well as theirs continued up to the moment of the accident, or until it could not possibly be averted. His opportunity to discover and avoid the danger was at least as good as theirs. His want of care existing as late as theirs was a concurring

cause of his injury, and bars his recovery. This determination is entirely consistent with what Mr. Thompson in his work above cited has styled the "last clear chance" doctrine, as is obvious from a consideration of the terms in which it is stated. As originally announced it was thus phrased: —

"The party who has the last opportunity of avoiding accident is not excused by the negligence of any one else. His negligence, and not that of the one first in fault, is the sole proximate cause of the injury." (1 Shear. & Red. Law of Neg., 5th ed., § 99.)

Mr. Thompson rewords it as follows: —

"Where both parties are negligent, the one that had the last clear opportunity to avoid the accident, notwithstanding the negligence of the other, is solely responsible for it — his negligence being deemed the direct and proximate cause of it." (1 Thomp. Com. Law Neg. § 240.)

Expressions are to be found in the reports seemingly at variance with the conclusion here reached, but for the most part the decisions holding a defendant liable for failure to discover and act upon the plaintiff's negligence were made in cases which were in fact like *Railway Co.* v. *Arnold*, 67 Kan. 260, 72 Pac. 857, or were decided upon the theory that they fell within the same rule. There the plaintiff's decedent while riding a bicycle was through his own fault run into by a street-car; he clung to the fender, was carried some seventy-five feet, then fell under the wheels, and was killed. A judgment against the street-car company was upheld only upon the theory that after he had reached a position of danger from which he could not extricate himself — that is, after his negligence had ceased — the defendant's employees were negligent in failing to discover his peril and stop the car.

In *Robinson* v. *Cone*, 22 Vt. 213, 54 Am. Dec. 67, the writer of the opinion said: —

"I should hesitate to say that if it appeared that the want of ordinary care on the part of the plaintiff, *at the very time of the injury*, contributed either to produce or to enhance the injury, he could recover; because it seems to me that is equivalent to saying that the plaintiff, by the exercise of ordinary care at the time, could have escaped the injury." (Page 223.)

The principle thus intimated was embodied in a decision in *French* v. *The Grand Trunk Railway Co.*, 76 Vt. 441, 58 Atl. 722, where it was said: —

"It is true that when a traveller has reached a point where he cannot help himself, cannot extricate himself, and vigilance on his part will not avert the injury, his negligence in reaching that position becomes the condition and not the proximate cause of the injury, and will not preclude a recovery; but it is equally true that if a traveller, when he reaches the point of collision, is in a situation to help himself, and by a vigilant use of his eyes, ears, and physical strength to extricate himself and avoid injury, his negligence at that point will

prevent a recovery, notwithstanding the fact that the trainmen could have stopped the train in season to have avoided injuring him. In such a case the negligence of the plaintiff is concurrent with the negligence of the defendant, and the negligence of each is operative at the time of the accident. When negligence is concurrent and operative at the time of the collision, and contributes to it, there can be no recovery." (Page 447.)

To the same effect are these extracts: —

. . . . . .

[As to the rule holding the defendant liable notwithstanding the contributory negligence of the plaintiff.]

Of the same rule it was said in *O'Brien* v. *McGlinchy*, 68 Me. 552:

"This rule applies usually in cases where the plaintiff or his property is in some position of danger from a threatened contact with some agency under the control of the defendant when the plaintiff cannot and the defendant can prevent an injury. . . . But this principle would not govern where both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them." (Pages 557, 558.)

In *Smith* v. *Railroad*, 114 N. C. 728, 19 S. E. 863, 25 L. R. A. 287, the general rule was thus concretely stated: —

"Applying the rule which we have stated to accidents upon railroad-tracks, it may be illustrated as follows: First, there must be a duty imposed upon the engineer, as otherwise there can be no negligence to which the negligence of the injured party is to contribute. The duty under consideration is to keep a vigilant lookout . . . in order to discover and avoid injury to persons who may be on the track and who are apparently in unconscious or helpless peril. When such a person is on the track and the engineer fails to discover him in time to avoid a collision, when he could have done so by the exercise of ordinary care, the engineer is guilty of negligence. The decisive negligence of the engineer is when he has reached that point when no effort on his part can avert the collision. Hence, if A, being on the track and after this decisive negligence, fails to look and listen and is in consequence run over and injured, his negligence is not concurrent merely but really subsequent to that of the engineer, and he cannot recover, as he and not the engineer has 'the last clear opportunity of avoiding the accident.' If, however, A is on the track . . . and while there, and before the decisive negligence of the engineer, he by his own negligence becomes so entangled in the rails that he cannot extricate himself in time to avoid the collision, and his helpless condition could have been discovered had the engineer exercised ordinary care, then the negligence of A would be previous to that of the engineer, and the engineer's negligence would be the proximate cause, he, and not A, having the last clear opportunity of avoiding the injury. The same result would follow in the case of a wagon negligently stalled, when

no effort of the owner could remove it, and there are other cases to which the principle is applicable." (Pages 755, 756.)

The principle running through these cases is reasonable and is consistent with the general rules that have met with practically universal acceptance. Applied to the facts of this case it requires an affirmance of the judgment.

All the Justices concurring.

DROWN v. NORTHERN OHIO TRACTION COMPANY.

1907. 76 *Ohio State*, 234.[1]

Action for damage done to plaintiff's buggy by an electric car which came up behind it and hit it. Answer: denying that defendant was negligent, and alleging negligence on plaintiff's part.

On the trial, it appeared that Hardy, plaintiff's driver, drove upon the track without looking behind to see if a car was coming.

Defendant requested the following instructions: —

(3) If the jury find from the evidence that the plaintiff, through his agent, Hardy, and the defendant were both negligent, and that the negligence of both directly contributed to cause the injury complained of in plaintiff's petition, then your verdict should be for the defendant.

(4) If the jury find that the negligence of both plaintiff's agent and the defendant combined so as to directly cause the injury complained of by plaintiff, then your verdict should be for the defendant.

These requests to instruct were refused.

The court, among other instructions, charged in substance as follows: —

If you find that the motorman could, by the exercise of ordinary care, have seen the plaintiff and stopped the car, and that by reason of the failure to stop the car Hardy's team was knocked down and injured, it would be such negligence on the part of the defendant as would entitle the plaintiff to recover, provided Hardy was free from contributory negligence on his part.

If Hardy was on this track driving south, and you find that he was negligent in being on it as he was, his failure to look or failure to watch to avoid injury, if he was negligent, would not prevent him from recovering in this suit, if the motorman, after discovering him in that position, could have, by the use of reasonable and ordinary care, avoided the injury by stopping the car. [This was a restatement in concrete form of an abstract proposition already stated in the charge.]

In the Common Pleas Court there was a verdict for plaintiff and

[1] Statement abridged. Arguments and part of opinion omitted. — Ed.

judgment thereon. The Circuit Court reversed the judgment of the Common Pleas. Plaintiff brought error.

G. M. Anderson and *A. J. Wilhelm*, for plaintiff in error.

Rogers, Rowley & Rockwell, for defendant in error.

DAVIS, J. Under the issues in this case, evidence was introduced tending to prove that the plaintiff's agent was guilty of negligence directly contributing to the injury to plaintiff's property. If the driver of the plaintiff's team, immediately upon entering Main Street, and without afterwards looking to the north, as he admits, drove southward upon the track until the car coming from the north overtook and collided with the buggy, he was negligent; because the street was open and unobstructed for from two hundred to two hundred and fifty feet from the point at which he entered upon it, and it was not necessary for him to go upon the street railway track, and because, the night being dark, he unnecessarily put himself in a place of obvious danger and continued therein until the moment of the accident, without looking out for an approaching car or doing anything whatever to avoid injury, apparently risking his life and the property of his principal upon the presumption that the defendant's employees would make no mistakes nor be guilty of any negligence. If, on the other hand, he drove along the street until he came to the obstruction and then turned out upon the track to go around it without again looking, as his own testimony shows that he did not, and was then almost in the same instant struck by the car, he was negligent. Upon either hypothesis, assuming that the defendant was negligent in not keeping a proper lookout, or was otherwise not exercising ordinary care to prevent collision with persons lawfully on its track, the plaintiff could not recover, if it should appear in the case that the negligence of both is contemporaneous and continuing until after the moment of the accident, because, in such case the negligence of each is a direct cause of the injury without which it would not have occurred, rendering it impracticable in all such instances, if not impossible, to apportion the responsibility and the damages. Suppose, for example, that not only the buggy and horses had been injured, but the defendant's car also, by what standard could the extent of liability of either party be determined? *Timmons* v. *The Central Ohio Railroad Co.*, 6 Ohio St. 105; *Village of Conneaut* v. *Naef*, 54 Ohio St. 529, 531. In short, there can be no recovery in such a case unless the whole doctrine of contributory negligence, a doctrine founded in reason and justice, should be abolished.

Under these circumstances, therefore, it was not sufficient to say to the jury that if they should find that the motorman who had charge of the car which struck the team, could by the exercise of ordinary care have seen the team and could have stopped the car and that by reason of the failure to do so the team was injured, it would be such negligence by the defendant as would entitle the plaintiff to recover, provided that the plaintiff's driver was "free from contributory negligence." The defendant had the right to have the jury specifically instructed, as it

requested, that if the jury should find from the evidence that both the plaintiff and the defendant, through their agents, were negligent, and that the negligence of both combined so as to directly cause the injury complained of, then the verdict should be for the defendant. The court refused to so instruct the jury, and the circuit court correctly held that the refusal to so charge was erroneous.

The error in refusing the defendant's request to charge, was extended and made much more prejudicial when the court, after giving instructions as to contributory negligence by the plaintiff in very general terms, proceeded to impress upon the jury, by repetition and with some emphasis, the doctrine known as "the last chance." This doctrine is logically irreconcilable with the doctrine of contributory negligence, and accordingly it has been vigorously criticised and warmly defended. Probably, as in many such controversies, the truth lies in middle ground; but it is certain that the rule is applicable only in exceptional cases, and the prevalent habit of incorporating it in almost every charge to the jury in negligence cases, in connection with, and often as a part of, instructions upon the subject of contributory negligence, is misleading and dangerous.

This confusion seems to arise either from misapprehension of the law or a want of definite thinking. The doctrine of the "last chance" has been clearly defined by a well-known text-writer as follows: "Although a person comes upon the track negligently, yet if the servants of the railway company, *after they see* his danger, can avoid injuring him, they are bound to do so. And, according to the better view with reference to injuries to travellers at highway crossings — as distinguished from injuries to *trespassers* and *bare licensees* upon railway tracks at places where they have no legal right to be — the servants of the railway company are bound to keep a vigilant lookout in front of advancing engines or trains, to the end of discovering persons exposed to danger on highway crossings; and the railway company will be liable for running over them if, by maintaining such a lookout and by using reasonable care and exertion to check or stop its train, it could avoid injury to them." 2 Thompson, Negligence, sec. 1629. The italics are the author's. Now, it must be apparent upon even a slight analysis of this rule that it can be applied only in cases where the negligence of the defendant is proximate and that of the plaintiff remote; for if the plaintiff and the defendant both be negligent and the negligence of both be concurrent and directly contributing to produce the accident, then the case is one of contributory negligence pure and simple. But if the plaintiff's negligence merely put him in the place of danger and stopped there, not actively continuing until the moment of the accident, and the defendant either knew of his danger, or by the exercise of such diligence as the law imposes on him would have known it, then, if the plaintiff's negligence did not concurrently combine with defendant's negligence to produce the injury, the defendant's negligence is the proximate cause of the injury and that of the plaintiff is

a remote cause. This is all there is of the so-called doctrine of "the last clear chance." A good illustration is found in the case of *Railroad Co.* v. *Kassen*, 49 Ohio St. 230. Kassen walked through the rear car of the train on which he was a passenger to the rear platform, from which he either stepped off or fell off upon the track, where he lay for about two hours, when he was run over by another train. It was held that, although Kasson may have been negligent in going upon the rear platform and stepping or falling off, yet since the railroad company knew of his peril and had ample time to remove him or to notify the trainmen on the later train, its negligence in not doing so was the proximate cause of Kassen's death and the negligence of Kassen was remote. In that case the proximate cause and the remote cause were so clearly distinguishable, and it is so very evident from the opinion and the syllabus that this distinction was the real ground of the judgment of the court, that it is somewhat surprising that the doctrine of last chance as stated in that case should have been so often misinterpreted as a qualification of the doctrine of contributory negligence.

It is clear, then, that the last chance rule should not be given as a hit or miss rule in every case involving negligence. It should be given with discrimination. Since the plaintiff can recover only upon the allegations of his petition, if there is no charge in the petition that the defendant after having notice of the plaintiff's peril could have avoided the injury to plaintiff, and there is no testimony to support such charge, the giving of such a charge would be erroneous. There is no such allegation in the petition in this case. But further, there is testimony tending to prove that the plaintiff's team was driven upon the street railway track in the night time, ahead of the car, and that it continued on the track for a distance of two hundred and fifty feet until struck by the car, without taking any precaution to avoid accident. Assuming that the defendant was negligent in not seeing the buggy on the track and in not avoiding the accident, yet the plaintiff's negligence was continuous and was concurrent at the very moment of the collision. It proximately contributed to the collision, for without it the collision would not have occurred. There was no new act of negligence by the defendant, which was independent of the concurrent negligence and which made the latter remote. Therefore there was no place in the case for the doctrine of "the last clear chance."

[Remainder of opinion omitted.]

Judgment of Circuit Court affirmed.

BAKER, J., IN CLEVELAND, &c., R. R. CO. *v.* KLEE.

1900. 154 *Indiana*, 430, pp. 434, 435.

Baker, J. It is alleged in the fifth paragraph: "That on or about the 22d day of June, 1894, this plaintiff, a child nine years of age, was on the said crossing of Georgia and Helen streets and upon said track of said defendant in said Georgia Street; and while in said position and place, the defendant through and by its said employees and servants, ran said locomotive against this plaintiff and negligently dragged this plaintiff without fault or negligence on his part, a long distance, to wit, two hundred feet; that the defendant knew that it had run its locomotive against this plaintiff at said crossing; and knew that it had knocked this plaintiff down in front of its said locomotive upon its said track; and knew that this plaintiff was dragging in front of said locomotive on said track; but that this defendant negligently failed to stop said locomotive before this plaintiff was injured, although by the exercise of due care and caution it could have stopped said locomotive before this plaintiff was injured; but negligently dragged this plaintiff as aforesaid, without fault or negligence on the part of this plaintiff, and negligently injured this plaintiff in his body, back and limbs." The injury for which compensation is sought in this paragraph was not sustained in the collision at the crossing, but was wholly inflicted after appellant knew that appellee was being dragged along the track in front of the engine. By the exercise of due care appellant could have stopped the engine before appellee was injured, but failed to do so. Appellee, after being struck and while being dragged along the track, was free from fault contributing to his injury. These allegations constitute a cause of action. Though the paragraph confesses, by not denying, that appellee was guilty of negligence in being upon the track, that negligence was only the remote condition, not the proximate cause, of the injury complained of; for the injury resulted, after the collision, entirely from occurrences in which it is alleged that appellant was negligent and appellee was not.

HOLMES *v.* MISSOURI PACIFIC R. R. CO.

1907. 207 *Missouri*, 149.[1]

Action by C. W. Holmes and wife to recover for the death of their child, F. G. Holmes. The child, eight years old, was struck and killed by a locomotive engine at the crossing of an avenue. Two points in

[1] Statement abridged. Only so much of the case is given as relates to a single point. Arguments omitted. — Ed.

conflict were, whether defendant was negligent, and whether the child was contributorily negligent.

The following instruction was given at plaintiff's request: "(4) If the jury believe from the evidence that Freeborn G. Holmes was a boy of immature age, and had not the capacity of an adult, and that he exercised such care as ought reasonably to have been expected for one of his age and capacity, then he was not guilty of contributory negligence."

To this instruction, defendant excepted.

An instruction given at the request of defendant was, that, if the child failed to exercise such care and caution as an ordinarily prudent boy of his age and capacity should have exercised under the circumstances, and by reason thereof contributed to his own death, then your verdict must be for the defendant, regardless of all other facts in the case.

Verdict for plaintiff. Judgment for plaintiff in Circuit Court. Defendant appealed.

R. T. Railey, for appellant.

O. L. Houts and *Charles E. Morrow*, for respondent.

VALLIANT, J. . . . In the brief for defendant, pages 61 and 139, the idea is advanced that the only theory on which the plaintiffs' judgment could be sustained would be that the defendant is liable for the consequences of the reckless conduct of the deceased child. That is a misconception of the theory on which the defendant's liability rests. The defendant is liable only for its own negligence, and if its plea of contributory negligence is not sustained, still, it is not charged with the consequence of the child's negligence; but it is only not excused thereby for the result of its own negligence. It is not always essential to a plaintiff's recovery, in an action for tort, that the evidence should show that the accident was the result of the defendant's negligence alone. A defendant may be liable if his negligence contributes with that of a third person to produce the injury complained of; in such case he is not held liable for the negligence of the third person, but only for his own negligence, without the contributing force of which the negligence of the third person would not have caused the injury. But the policy of the law is such that ordinarily a defendant guilty of negligence is relieved from the liability for his own conduct if the person injured was himself guilty of negligence that contributed to the result. On that theory the defendant's act is none the less negligent, and he is none the less culpable, but the law will not allow a plaintiff to recover when he himself, or the person for whose injury he sues, was also guilty of negligence contributing with that of defendant to the result. There is reason and justice in that policy of the law; it is an admonition to every one to exercise due care for his own safety, and it authorizes another to presume that he will do so, and, so presuming, adjust his own conduct. But common experience tells us that a child may be too young and immature to observe the care necessary

to his own preservation and therefore when a person comes in contact with such a child, if its youth and immaturity are obvious, he is chargeable with knowledge of that fact and he cannot indulge the presumption that the child will do what is necessary to avoid an impending danger. Therefore one seeing such a child in such a position is guilty of negligence if he does not take into account the fact that it is a child and regulate his own conduct accordingly. An act in relation to a person of mature years might be free from the imputation of negligence while an act of like character in view of a child would be blameworthy. Therefore when the law says to the defendant although the act of the deceased child contributed with your act to produce the result, yet, because of his youth and immaturity, he is not adjudged guilty of negligence, it does not charge the defendant with the consequence of the child's conduct, but it only does not, for that reason, excuse him for its [his] own negligence.

If the defendant in such case had been guilty of no negligence there would have been no accident.

. . . . . .

Judgment affirmed.

GANTT, C. J., and BURGESS, LAMM, and WOODSON, JJ., concur. FOX and GRAVES, JJ., dissent.[1]

CULBERTSON *v.* CRESCENT CITY R. R. CO.

1896. 48 *Louisiana Annual*, Part 2, 1376.[2]

PLAINTIFF sued for the killing of his son, 6 years and 11 months old, who was hit by a car at a street crossing.

In the District Court, there was a verdict for plaintiff, and judgment thereon. Defendant appealed.

O. B. Sansum, for plaintiff.

Farrar, Jonas & Kruttschnitt, for defendant.

BREAUX, J. [After stating the claims of both parties, and reciting the testimony of plaintiff's witnesses and of part of defendant's witnesses.]

The motorman and the conductor substantially testify that everything was done to prevent the accident; that the boy darted in front of the car, and that the motorman quickly stopped the car.

After as careful and close an analysis of the evidence as it was possible for us to make, we think that the weight of the testimony is with the defendant.

Plaintiff's theory that the little boy was standing on the track, be-

[1] As to the standard of care required of children, see cases, *ante*, chap. v, where defendant alleged that the action was barred by the contributory negligence of the child. — ED.

[2] Statement abridged. — ED.

tween the rails, and that the motorman ought to have seen him, is not sustained by the evidence of his own witnesses; they do not testify, with any degree of certainty, where he was just preceding the accident. The witnesses for the defendant agree in stating that he was not on the track, and that the accident was occasioned by the sudden act of the child.

Granted as contended by the plaintiff that the motorman did not see the child before he was knocked down by the fender: if the child had escaped his attention, because of his sudden and unanticipated act itself, it becomes evident that the defendant is not liable. Whether he was seen or was not seen by the motorman would not render the defendant responsible, if owing to thoughtless impulse of the child he brought about the accident by a sudden act which could not be foreseen or guarded against by the motorman or any one else in charge of the car.

This brings us to the question of contributory negligence. Courts are averse to finding children guilty of contributory negligence, and are readily and properly inclined to disregard the thoughtlessness natural to boyhood, but accidents may happen for which the unconscious agent may not be responsible.

The fact that a child may not be capable of contributory negligence does not always render a defendant liable upon the mere proof of the injury. The test is negligence *vel non*. If the defendant or the defendant's agent or employee was not negligent, it is not liable.

The only alternative, after the conclusion reached, is to set aside the verdict.

The verdict and judgment are reversed, annulled and avoided.

The demand of plaintiff is rejected and his action dismissed at his cost in both courts.[1]

[1] In *Kierzenkowski* v. *Philadelphia Traction Co.*, 184 Pa. State, 459, the plaintiff was a girl three years old, who had been knocked down by one of defendant's horse cars. The court (*inter alia*) instructed the jury, in substance, as follows: —

The law does not allow that children of this age can be guilty of contributory negligence; but you are obliged to consider the case as to the negligence alone of the defendant. If you were driving along the street with your horse and wagon, and a child runs under the feet of the horses and is killed, you are not responsible; not because the child is guilty of contributory negligence, but because you are not guilty of negligence. If it is an unavoidable accident, you are not responsible. If the jury believe from the evidence in this case that the child suddenly and unexpectedly appeared in the vicinity of the track under such circumstances that the driver of the car could not have discovered its presence in time to avoid the accident, the verdict must be for the defendant.

An exception to the charge was overruled. — Ed.

SECTION III.

Defendant intentionally causing Damage to Plaintiff.

STEINMETZ *v.* KELLY.

1880. 72 *Indiana*, 442.[1]

From the Jefferson Circuit Court.

E. P. Ferris and *W. W. Spencer*, for appellant.

W. D. Wilson and *C. H. Wilson*, for appellee.

Worden, J. Action by the appellee against the appellant for assault and battery. The complaint consisted of three paragraphs, a demurrer to each of which, for want of sufficient facts, was overruled. The first, the only one to which any specific objection is made in this Court, alleged that the defendant, on, &c., "violently and unlawfully assaulted the plaintiff, and struck him, and also threw him, the plaintiff, from the house of the defendant on to the street pavement, in front of the defendant's house, with great violence, fracturing," &c.

The defendant answered: —

First. [That there was a justifiable occasion for his use of force, and that he used no more force than was necessary.]

Second. General denial.

The plaintiff replied by general denial to the first paragraph of the answer. Trial by jury, verdict and judgment for the plaintiff for $500.

The counsel for the appellant in their brief say: "We shall not stop now to discuss the merits of the complaint further than to say that the first paragraph of the complaint shows an eviction from the defendant's premises, and we have thought that the paragraph should aver that the injury occurred without the fault of the plaintiff." The paragraph does not charge an injury to the plaintiff arising out of the negligence of the defendant, but an unlawful assault upon, and battery of, the plaintiff's person. In such cases it is not necessary to allege that the plaintiff was without fault, or, in other words, was not guilty of contributory negligence. There remains nothing more to be considered except such questions as arise on a motion for a new trial.

[Omitting part of opinion.]

The defendant asked that the following interrogatory be answered by the jury, if they should return a general verdict, viz.: "Did the

[1] Part of opinion omitted. — Ed.

fault or negligence of the plaintiff contribute in any way to the injury of the plaintiff, received on the evening of the 3d of March, 1876?" The Court declined to direct the jury to answer the interrogatory, and in this we think no error was committed.

The right of the plaintiff to recover depended not upon any negligence of the defendant, but upon the assault and battery, which, if perpetrated at all by the defendant, was intentional and purposed. It may be that the defendant did not intend to inflict so severe an injury upon the plaintiff as seemed to result from the excess of force applied by him; but it does not therefore follow that he did not intend to apply that force.

The doctrine that contributory negligence on the part of the plaintiff will defeat his action has been generally applied in actions based on the negligence of the defendant, in short, in cases involving mutual negligence. But it has also been applied in some cases where the matter complained of was not negligence merely, but the commission of some act in itself unlawful, without reference to the manner of committing it, as the wilful and unauthorized obstruction of a highway, whereby a person is injured. *Butterfield* v. *Forrester*, 11 East, 60; *Dygert* v. *Schenck*, 23 Wend. 446.

The doctrine, however, can have no application to the case of an intentional and unlawful assault and battery, for the reason that the person thus assaulted is under no obligation to exercise any care to avoid the same by retreating or otherwise, and for the further reason that his want of care can in no just sense be said to contribute to the injury inflicted upon him by such assault and battery.

An intentional and unlawful assault and battery inflicted upon a person is an invasion of his right of personal security, for which the law gives him redress, and of this redress he cannot be deprived on the ground that he was negligent and took no care to avoid such invasion of his right.

The trespass was purposely committed by the defendant. If he could excuse it on the ground of the alleged misconduct of the plaintiff, and if he employed no more force than was necessary and reasonable, that was a complete defence. Otherwise the plaintiff, if he made out the trespass, was entitled to recover, and no negligence on his part, as before observed, could defeat his action. The case of *Ruter* v. *Foy*, 46 Iowa, 132, is in point. There the plaintiff alleged that the defendant had assaulted and beat her with a pitchfork. On the trial the defendant asked, but the Court refused, the following instruction: "If you find from the evidence that the plaintiff was injured, or contributed to her injury, by her own act or negligence, defendant would not be liable for assault and battery upon her, and plaintiff cannot recover." On appeal the Court said upon this point: "The doctrine of contributory negligence has no application in an action for assault and battery."

The case here is entirely unlike that of *Brown* v. *Kendall*, 6 Cush.

292. There the defendant's dog and another were fighting. The defendant was beating the dogs with a stick in order to separate them, in doing which he accidentally hit the plaintiff in the eye with the stick. It was held that trespass *vi et armis* was the proper form of action, because the injury to the plaintiff was immediate; but that as the parting of the dogs was a proper and lawful act, and as the hitting of the plaintiff was not intentional, but a mere accident or casualty, the plaintiff could not recover at all without showing a want of ordinary care on the part of the defendant; and then that contributory negligence on the part of the plaintiff would defeat the action.

Although, according to the common-law system of pleading, trespass *vi et armis* was the proper form of action in such case, the essential and only ground on which the action could rest was the negligence of the defendant in doing an act lawful in itself whereby the plaintiff was injured, and this is so as fully as if the plaintiff had framed his declaration in case for the negligence.

The difference between that case and the present is substantial and vital. In that case the battery was unintentional, and the defendant therein was guilty of no wrong save his negligence. Here the defendant intentionally perpetrated the battery, and the plaintiff's right to recover was not based upon the negligence of the defendant at all.

[Omitting part of opinion.]

We find no error in the record.

The judgment below is affirmed with costs.

Petition for a rehearing overruled. *Judgment affirmed.*

LOUISVILLE, &c., R. R. CO. *v.* BRYAN.

1886. 107 *Indiana*, 51.

From the Clinton Circuit Court.

G. W. Easley, *G. W. Friedley* and *W. H. Russell*, for appellant.

J. B. Sherwood, for appellee.

MITCHELL, J. This action was brought by Bryan against the railway company, to recover damages for killing one horse and injuring another, while both were being driven in a buggy, by the plaintiff, across the defendant's track, at a street crossing in the northern part of the city of Lafayette.

The complaint was in two paragraphs, one of which counted upon the negligence of the defendant, while the other was to recover for an injury alleged to have been purposely or wilfully committed. In the one paragraph suitable averments, to the effect that the plaintiff exercised due care, and was without fault, are found. In the other no such averments are contained.

By their general verdict, the jury found for the plaintiff on the latter paragraph, and for the defendant on the first. Judgment was rendered accordingly.

One of the errors assigned is, that the court erred in overruling a demurrer to that paragraph of the complaint upon which the verdict and judgment against the appellant rest.

There being no averment that the plaintiff was without fault, an inference arises that he may have been guilty of contributory negligence, and, therefore, unless the complaint, by the specific statement of facts, rebuts this inference, or charges that the injury was purposely and wilfully committed, it states no cause of action.

The charging part of the paragraph is in these words:

"And that said collision was caused by the reckless, negligent and wilful conduct of said employees and servants of said defendant in the management of said locomotive, in this, to wit: That said locomotive was being propelled at an exceedingly high and dangerous rate of speed, and was being propelled backwards, and that the whistle on said locomotive was not sounded, and the bell was not rung, to give warning of the approach of said locomotive, by the employees and servants of said defendant in charge of said locomotive; that said crossing was made extra-dangerous by the track being hidden from view for some distance by intervening buildings, all of which was well known to said defendant, and its servants and employees, as aforesaid."

The general charge is, that the collision was caused by the reckless, negligent and wilful conduct of the defendant's employees and servants.

The specific acts of wilfulness charged are, that they propelled the locomotive backwards over the crossing, the track being hidden from view by intervening buildings, at a dangerous rate of speed, without giving warning by ringing the bell, or sounding the whistle.

That the conduct imputed to the employees of the railway company was negligent, cannot be doubted, but negligence, no matter how gross, cannot avail in an action where it is necessary, on account of the plaintiff's contributory negligence, to aver and prove that the injury was inflicted by design or with an actual or constructive intent. In such a case, it is incumbent on the plaintiff to aver and prove that the injury was intentional, or that the act or omission which produced it was wilful and of such a character as that the injury which followed must reasonably have been anticipated as the natural and probable consequence of the act. Where one person negligently comes into a situation of peril, before another can be held liable for an injury to him, it must appear that the latter had knowledge of his situation in time to have prevented the injury. Or it must appear that the injurious act or omission was by design, and was such — considering time and place — as that its nature and probable consequence would be to produce serious hurt to some one. To constitute a wilful injury, the act which produced it must have been intentional, or must have been done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury

complained of. It involves conduct which is *quasi criminal. Louisville, etc., Canal Co.* v. *Murphy,* 9 Bush, 522; *Louisville, etc., R. R. Co.* v. *Filbern,* 6 Bush, 574; *Peoria Bridge Ass'n* v. *Loomis,* 20 Ill. 235.

The facts averred fail to bring the case within either of the foregoing conditions, or to indicate an actual or constructive intent on the part of the appellant. It does not appear that its employees knew of the presence of the plaintiff or his team, nor is there anything averred from which it can be inferred that the crossing and its surroundings were such as that the natural and probable consequence of running an engine over the highway in the manner described, would result in an injury. The facts are in no wise different from those involved in the ordinary case, where a locomotive is run over a highway at a high rate of speed, without giving the statutory signals. These are merely acts of non-feasance, not of aggressive wrong. The consequences of undenied contributory negligence cannot be avoided in such a case by the fact that the track was "hidden from view for some distance by intervening buildings." That the appellant may have been grossly and culpably negligent, may be admitted, but until the plaintiff is willing to assert that he was himself without fault, he is not, upon the specific facts stated in the paragraph under consideration, entitled to maintain an action. *Louisville, etc., R. W. Co.* v. *Schmidt,* 106 Ind. 73; *Ivens* v. *Cincinnati, etc., R. W. Co.,* 103 Ind. 27; *Terre Haute, etc., R. R. Co.,* v. *Graham,* 95 Ind. 286 (48 Am. R. 719); *Pennsylvania Co.* v. *Sinclair,* 62 Ind. 301 (30 Am. R. 185); *Indianapolis, etc., R. R. Co.* v. *McClaren,* 62 Ind. 566; *Chicago, etc., R. R. Co.* v. *Hedges,* 105 Ind. 398.

The words "wilful" and "negligent," used in conjunction, have not always been employed with strict regard for accuracy of expression. To say that an injury resulted from the negligent and wilful conduct of another, is to affirm that the same act is the result of two exactly opposite mental conditions. It is to affirm in one breath that an act was done through inattention, thoughtlessly, heedlessly, and at the same time purposely and by design. It seems to be supposed that by coupling the words together, a middle ground between negligence and wilfulness, between acts of nonfeasance and misfeasance, may be arrived at. It is only necessary to say that the distinction between cases falling within the one class or the other, is clear and well defined, and cases in neither class are aided by importing into them attributes pertaining to the other. Beach Cont. Neg. 67, 68.

What has been said disposes of all other pertinent questions arising on the instructions, given and refused.

The demurrer to the paragraph of the complaint under consideration should have been sustained. For the error in overruling it, the judgment is reversed, with costs.[1]

[1] "Negligence and wilfulness are as unmixable as oil and water. 'Wilful negligence' is as self-contradictory as 'guilty innocence.'" BAKER, J., in *Kelly* v. *Malott,* 135 Fed. Rep. 74, p. 76.

But see Salmond on Jurisprudence, ed. 1902, 434-435. — ED.

AIKEN *v.* HOLYOKE STREET R. R. CO.

1903. 184 *Massachusetts*, 269.

TORT by an infant against a street railway company for personal injuries. Writ dated July 6, 1898.

At a previous stage of this case, reported in 180 Mass. 8, the plaintiff's exceptions were sustained by this court after a verdict had been ordered in the Superior Court for the defendant. At the new trial in the Superior Court before Lawton, J., the jury returned a verdict for the plaintiff in the sum of $5000. The defendant alleged exceptions, raising the questions stated by the court.

W. H. Brooks (*W. Hamilton* with him), for the defendant.

A. L. Green (*F. F. Bennett* with him), for the plaintiff.

KNOWLTON, C. J. The most important question in this case grows out of the instructions to the jury upon the third count. This count charges the defendant, by its servants, with having started up the car recklessly, wantonly and with gross disregard of the plaintiff's safety, while he was in a place of great peril upon the step of the car, and with having thrown him upon the ground and under the wheels of the car. There was evidence tending to show that the plaintiff, a boy six and one half years of age, ran near or against the car, and was upon the lower step at the forward end as the car was going around a curve from one street into another, and was clinging to the step trying to get into a stable position, and that he there cried out to the motorman, "Let me off"; that the motorman saw and heard him and knew that he was in a place of danger, and that he then turned on the power in a wanton and reckless way, with a view to start the car quickly, and that the plaintiff was thus thrown off and injured. This testimony was contradicted, but it was proper for the consideration of the jury. The judge instructed the jury that if they found the facts to be in accordance with this contention of the plaintiff, they would be warranted in finding that the conduct of the motorman was wanton and reckless, and in returning a verdict for the plaintiff. He also instructed them that to maintain the action on this ground, it must be proved that the motorman wilfully and intentionally turned on the power, with a view to making the car start forward rapidly and go at full speed quickly, but that it was not necessary to prove that he did this with the intention of throwing the boy off and injuring him. He also told them that to warrant a recovery upon this state of facts, the plaintiff need not show that he was in the exercise of due care. The defendant excepted to that part of the instruction which relates to due care on the part of the plaintiff.

The defendant contends that while it was not necessary for the plaintiff to show due care anterior to the act of the motorman, he was bound to show due care which was concurrent with this act and imme-

diately subsequent to it. This brings us to a consideration of the rules and principles applicable to this kind of liability. It is familiar law that in the absence of a statutory provision, mere negligence, whatever its degree, if it does not include culpability different in kind from that of ordinary negligence, does not create a liability in favor of one injured by it, if his own negligence contributes to his injury. It is equally true that one who wilfully and wantonly, in reckless disregard of the rights of others, by a positive act or careless omission exposes another to death or grave bodily injury, is liable for the consequences, even if the other was guilty of negligence or other fault in connection with the causes which led to the injury. The difference in rules applicable to the two classes of cases results from the difference in the nature of the conduct of the wrongdoers in the two kinds of cases. In the first case the wrongdoer is guilty of nothing worse than carelessness. In the last he is guilty of a wilful, intentional wrong. His conduct is criminal or *quasi* criminal. If it results in the death of the injured person, he is guilty of manslaughter. *Commonwealth* v. *Pierce*, 138 Mass. 165; *Commonwealth* v. *Hartwell*, 128 Mass. 415. The law is regardful of human life and personal safety, and if one is grossly and wantonly reckless in exposing others to danger, it holds him to have intended the natural consequences of his act, and treats him as guilty of a wilful and intentional wrong. It is no defence to a charge of manslaughter for the defendant to show that, while grossly reckless, he did not actually intend to cause the death of his victim. In these cases of personal injury there is a constructive intention as to the consequences, which, entering into the wilful, intentional act, the law imputes to the offender, and in this way a charge which otherwise would be mere negligence, becomes, by reason of a reckless disregard of probable consequences, a wilful wrong. That this constructive intention to do an injury in such cases will be imputed in the absence of an actual intent to harm a particular person, is recognized as an elementary principle in criminal law. It is also recognized in civil actions for recklessly and wantonly injuring others by carelessness. *Palmer* v. *Chicago, St. Louis & Pittsburgh Railroad*, 112 Ind. 250; *Shumacher* v. *St. Louis & San Francisco Railroad*, 39 Fed. Rep. 174; *Brannen* v. *Kokomo, Greentown & Jerome Gravel Road Co.*, 115 Ind. 115. In an action to recover damages for an assault and battery, it would be illogical and absurd to allow as a defence, proof that the plaintiff did not use proper care to avert the blow. See *Sanford* v. *Eighth Avenue Railroad*, 23 N. Y. 343, 346. It would be hardly less so to allow a similar defence where a different kind of injury was wantonly and recklessly inflicted. A reason for the rule is the fact that if a wilful, intentional wrong is shown to be the direct and proximate cause of an injury, it is hardly conceivable that any lack of care on the part of the injured person could so concur with the wrong as also to be a direct and proximate contributing cause to the injury. It might be a condition without which the injury could

not be inflicted. See *Newcomb* v. *Boston Protective Department*, 146 Mass. 596. It might be a remote cause, but it hardly could be a cause acting directly and proximately with the intentional wrongful act of the offender. *Judson* v. *Great Northern Railway*, 63 Minn. 248, 255. The offence supposed is different in kind from the plaintiff's lack of ordinary care. It is criminal or *quasi* criminal. Not only is it difficult to conceive of a plaintiff's negligence as being another direct and proximate cause foreign to the first, yet acting directly with it, but it would be unjust to allow one to relieve himself from the direct consequences of a wilful wrong by showing that a mere lack of due care in another contributed to the result. The reasons for the rule as to the plaintiff's care in actions for ordinary negligence are wanting, and at the same time the facts make the rule impossible of application. The general rule that the plaintiff's failure to exercise ordinary care for his safety, is not a good defence to an action for wanton and wilful injury caused by a reckless omission of duty, has been recognized in many decisions, as well as by writers of text-books. *Aiken* v. *Holyoke Street Railway*, 180 Mass. 8, 14, 15; *Wallace* v. *Merrimack River Navigation & Express Co.*, 134 Mass. 95; *Banks* v. *Highland Street Railway*, 136 Mass. 485, 486; *Palmer* v. *Chicago, St. Louis & Pittsburgh Railroad*, 112 Ind. 250; *Brannen* v. *Kokomo, Greentown & Jerome Gravel Road Co.*, 115 Ind. 115; *Florida Southern Railway* v. *Hirst*, 30 Fla. 1; *Shumacher* v. *St. Louis & San Francisco Railroad*, 39 Fed. Rep. 174; 7 Am. & Eng. Encyc. of Law (2d ed.) 443 and note; Beach, Contr. Neg. (3d ed.) §§ 46, 50, 64, 65; Wood, Railroads (2d ed.), 1452; Elliott, Railroads, § 1175; Thompson, Neg. § 206; Cooley, Torts (2d ed.), 810. We have been referred to no case in which it is held that it makes any difference whether the plaintiff's lack of ordinary care is only previous to the defendant's wrong and continuing to the time of it, or whether there is such a lack after the wrong begins to take effect. It is difficult to see how there can be any difference in principle between the two cases. In this Commonwealth, as in most other jurisdictions, liability does not depend upon which of different causes contributing to an injury is latest in the time of its origin, but upon which is the direct, active, efficient cause, as distinguished from a remote cause, in producing the result.

There are expressions in some of the cases which imply the possibility of contributory negligence on the part of the plaintiff in a case of wanton and reckless injury by a defendant. If there is a conceivable case in which a plaintiff's want of due care may directly and proximately contribute as a cause of an injury inflicted directly and proximately by the wilful wrong of another, such a want of care must be something different from the mere want of ordinary care to avoid an injury coming in a usual way. There is nothing to indicate the existence of peculiar conditions of this kind in the present case. Conduct of a plaintiff which would be negligence precluding recovery if the injury were caused by ordinary negligence of a defendant, will not

commonly preclude recovery if the injury is inflicted wilfully through wanton carelessness. This is illustrated by the former decision in this case and by many others. *Aiken* v. *Holyoke Street Railway*, 180 Mass. 8; *McKeon* v. *New York, New Haven, & Hartford Railroad*, 183 Mass. 271. As to this kind of liability of the defendant, it was certainly proper to instruct the jury that, in reference to ordinary kinds of care to avoid an injury from a car, the plaintiff need not show that he was in the exercise of due care if a lack of such care would have no tendency to cause the wilful and wanton injury. The fair interpretation of the instruction given is, that it referred to ordinary kinds of care to avoid an injury from an electric car. On this branch of the case there seems to have been no reason for an instruction in regard to any special care, and probably neither counsel nor the court had any care in mind except that, in reference to which, in any view of the law, the instruction was properly given. We are of opinion that the ruling excepted to was correct.

[Omitting opinion on other points.]

Exceptions overruled.

BANKS *v.* BRAMAN.

1905. 188 *Massachusetts*, 367.

Tort, for injuries from being struck by an automobile driven by the defendant on Mount Auburn Street in Cambridge near its intersection with Belmont Street shortly after eight o'clock on the evening of May 17, 1903. Writ dated November 18, 1903.

At the trial in the Superior Court before Aiken, C. J., the jury returned a verdict for the plaintiff in the sum of $3750; and the defendant alleged exceptions, raising the questions stated by the court.

B. D. Hyde, for the defendant.

J. L. Hall (*D. E. Mook* with him), for the plaintiff.

Knowlton, C. J. This is an action to recover for injuries received from being struck by an automobile alleged to have been negligently run at an excessive rate of speed, and negligently managed by the defendant. The case was submitted to the jury on two alleged grounds of liability: one, that the defendant, with gross negligence, wantonly and recklessly injured the plaintiff, and the other that the plaintiff was in the exercise of due care, and that the injury was due to the defendant's negligence. On the first claim the judge instructed the jury as follows: "Gross negligence is great negligence. To make out the proposition of gross negligence, you must be satisfied that the way the machine was operated by Braman was reckless, was careless to the degree of recklessness; that it was run with a reckless disregard to the rights of Banks in this street. If that is established, namely, that there

was a reckless disregard of the rights of Banks in the way this machine was run, then Banks is not required to show that he was himself in the exercise of due care. If the way — I repeat this for the purpose of plainness perhaps unnecessarily — if the manner in which the machine — the automobile, I mean by the machine — was run on the occasion of this accident was such that it was grossly negligent, that is, careless to such a degree that you can say it was reckless, using your common sense and judgment, and applying them to the evidence, then Banks is not required to show that he was in the exercise of due care; because if the defendant's carelessness was gross in the sense that has been defined to you, there is an obligation to pay damages independent of the matter of due care." The defendant excepted to this instruction. The jury were instructed as to the liability for a failure to exercise ordinary care, but there was no fuller statement of the law on this branch of the case.

The question is whether the difference between the two kinds of liability was sufficiently pointed out to give the jury an adequate understanding of it. The difference in culpability of the defendant, which distinguishes these different kinds of liability, is something more than a mere difference in the degree of inadvertence. In one case there need be nothing more than a lack of ordinary care, which causes an injury to another. In the other case there is wilful, intentional conduct whose tendency to injure is known, or ought to be known, accompanied by a wanton and reckless disregard of the probable harmful consequences from which others are likely to suffer, so that the whole conduct together, is of the nature of a wilful, intentional wrong.

[Here the learned judge quoted at length from *Aiken* v. *Holyoke Street Railway*, 184 Mass. 269, 271.]

In dealing with the same subject in *Bjornquist* v. *Boston & Albany Railroad*, 185 Mass. 130, 134, the court said: "The conduct which creates a liability to a trespasser in cases of this kind has been referred to in the books in a variety of ways. Sometimes it has been called gross negligence and sometimes wilful negligence. Plainly it is something more than is necessary to constitute the gross negligence referred to in our statutes and in decisions of this court. The term 'wilful negligence' is not a strictly accurate description of the wrong. But wanton and reckless negligence in this class of cases includes something more than ordinary inadvertence. In its essence it is like a wilful, intentional wrong. It is illustrated by an act which otherwise might be objectionable, but which is liable or likely to do great harm, and which is done in a wanton and reckless disregard of the probable injurious consequences." The ground on which it is held that, when an act of the defendant shows an injury inflicted in this way, the plaintiff need introduce no affirmative evidence of due care, is that such a wrong is a cause so independent of previous conduct of the plaintiff, which, in a general sense, may fall short of due care, that this previous conduct cannot be considered a directly contributing

cause of the injury, and, in reference to such an injury, the plaintiff, without introducing evidence, is assumed to be in a position to claim his rights and to have compensation. So far as the cause of his injury is concerned, he is in the position of one who exercises due care. *Aiken* v. *Holyoke Street Railway*, *ubi supra*.

It is not easy to explain to a jury the nature of this liability. What was said by the judge in this case comes very near to a correct statement of the law. But it lacks something in fulness, and we think the jury may have understood that negligence somewhat greater in degree than a mere lack of ordinary care or a simple inadvertence, but not different from it in kind, would constitute the gross negligence referred to. We are of opinion that when there is an attempt to establish this peculiar kind of liability, which exists independently of a general exercise of due care by the plaintiff, the jury should be instructed with such fulness as to enable them to know that they are dealing with a wrong materially different in kind from ordinary negligence. Because we think the instruction may have left the jury with a misunderstanding of the law, the exceptions are sustained.

We are of opinion that there was evidence which justified the submission of the case to the jury on this ground, as well as on the ground that the plaintiff was in the exercise of due care.

Exceptions sustained.

COLEMAN, J., IN BIRMINGHAM RAILWAY & ELECTRIC COMPANY *v.* BOWERS.

1895. 110 *Alabama*, 328, p. 331.

COLEMAN, J. . . . Mere negligence which gives a cause of action is the doing of an act, or the omission to act, which results in damage, but without intent to do wrong or cause damage. To constitute a wilful injury, there must be design, purpose, intent to do wrong and inflict the injury. Then there is that reckless indifference or disregard of the natural or probable consequence of doing an act, or omission of an act, designated, whether accurately or not, in our decisions, as "wanton negligence," to which is imputed the same degree of culpability and held to be equivalent to wilful injury. A purpose or intent to injure is not an ingredient of wanton negligence. Where either of those exist, if damage ensues, the injury is wilful. In wanton negligence, the party doing the act, or failing to act, is conscious of his conduct, and without having the intent to injure, is conscious, from his knowledge of existing circumstances and conditions, that his conduct will likely or probably result in injury. These are the distinctions between simple negligence, wilful injury, and that wanton negligence which is the equivalent of wilful injury, drawn and applied in our decisions. A mere error of

judgment as to the result of doing an act or the omission of an act, having no evil purpose or intent, or consciousness of probable injury, may constitute simple negligence, but cannot rise to the degree of wanton negligence or wilful wrong. . . .

COLEMAN, J., IN MEMPHIS & CHARLESTON RAILROAD COMPANY *v.* MARTIN.

1897. 117 *Alabama*, 367, p. 382.

COLEMAN, J. . . . The mere intentional omission to perform a duty or the intentional doing of an act contrary to duty, although such conduct be culpable and result in injury, without further averment, falls very far short of showing that the injury was intentionally or wantonly inflicted. Unless there was a purpose to inflict the injury, it cannot be said to have been intentionally done; and unless an act is done, or omitted to be done, under circumstances and conditions known to the person, that his conduct is likely to, or probably will result in injury, and through reckless indifference to consequences, he consciously and intentionally does a wrongful act, or omits an act, the injury cannot be said to be wantonly inflicted. These principles have been frequently declared by this court. . . .

JOHNSON, J., IN COLE *v.* METROPOLITAN STREET RAILWAY COMPANY.

1906. 121 *Missouri Appeal Reports*, 605, pp. 611–613.

JOHNSON, J. . . . For a motorman to be inattentive to the way ahead of him is so palpably negligent that it partakes of the nature of a reckless and wanton act. Therefore a defendant in an action of this character will not be heard to say that its motorman did not see the situation of the injured person where it was open to his view nor did not realize the peril where the indications would have disclosed it to any reasonable mind. Charged with the knowledge of the peril of another that could have been obtained by the use of ordinary care, a failure on the part of a motorman to make every reasonable effort to avoid injuring the endangered person would be in the highest degree wrongful, since it would be negligence committed with the knowledge that another certainly and immediately would be injured thereby. The principles of right and justice do not tolerate the idea that the negligence of the person imperilled involved in his act of placing himself in position to be injured without giving proper heed to his own safety can coöperate with the negligence

of one who comprehending his danger or being in a position to comprehend it by the use of ordinary care and having at hand the means and opportunity of avoiding it, fails to reasonably employ them and by such failure inflicts an injury. Such negligence engrosses the entire field of culpability and eliminates contributory negligence as a factor in the production of the injury. It logically follows from the principles stated that the issue of negligence in the performance of the humanitarian duty must be governed by the rules applicable to ordinary negligence. The determinative question in all such cases is, did the operators of the car use ordinary care to ascertain the peril of the plaintiff and to avoid the injury after they discovered it or should have discovered it?

In some of the decisions of the Supreme Court the idea appears to be expressed that in order to find a defendant guilty of a breach of the humanitarian rule the elements of wantonness and wilfulness must appear in its conduct, but as we have attempted to show the mere failure to observe ordinary care in situations of this character is of itself a wanton act since it is abhorrent not only to fundamental principles of law but to the dictates of common humanity. The views expressed are supported by the weight of authority in this state, including the most recent decisions of the Supreme and Appellate courts. . . .

McClellan, J., in GEORGIA PACIFIC R. R. CO. *v.* LEE.

1890. 92 *Alabama*, 262, pp. 269–271.

McClellan, J. . . . Many of the rulings of the trial court in defining the gross negligence, recklessness or wantonness on the part of the defendant, which will authorize recovery, notwithstanding plaintiff's contributory negligence, are presented for review. The fault in the court's definitions in this regard lies, in our opinion, in the assumption that recklessness or wantonness implying wilful and intentional wrong-doing may be predicated of a mere omission of duty, under circumstances which do not, of themselves, impute to the person so failing to discharge the duty a sense of the probable consequences of the omission. The charges given by the court in this connection, and its rulings on charges requested by the defendant, proceed on the theory that a mere failure on the part of defendant's employés to see plaintiff's wagon and team as soon as they might have seen them by the exercise of due care was such recklessness or wantonness as implies a willingness or a purpose on their part to inflict the injury complained of. We do not think this proposition can be maintained either logically or upon the authorities. The failure to keep a lookout, which it was the duty of defendant's employés to maintain, and which would

have sooner disclosed the peril of the driver and plaintiff's wagon and team — even conceding that such would have been the case — was, at the most, mere negligence, inattention, inadvertence; and it cannot be conceived, in the nature of things, how a purpose to accomplish a given result can be imputed to mental conditions, the very essence of which is the absence of all thought on the particular subject. To say that one intends a result which springs solely from his mind not addressing itself to the factors which conduce to it, to imply a purpose to do a thing from inadvertence in respect of it, are contradictions in terms. Wilful and intentional wrong, a willingness to inflict injury, cannot be imputed to one who is without consciousness, from whatever cause, that his conduct will inevitably or probably lead to wrong and injury. In the case at bar, this consciousness could not exist on the part of defendant's employés until they knew plaintiff's wagon and team were in a position of danger; and no degree of ignorance on their part of this state of things, however reprehensible in itself, could supply this element of conscious wrong, or reckless indifference to consequences, which, from their point of view, would probably or necessarily ensue.

The true doctrine, and that supported by many decisions of this court, as well as the great weight of authority in other jurisdictions, is that notwithstanding plaintiff's contributory negligence he may yet recover, if, in a case like this, the defendant's employés *discover the perilous situation in time to prevent disaster by the exercise of due care and diligence, and fail, after the peril of plaintiff's property becomes known to them as a fact* — and not merely after they should have known it — *to resort to all reasonable effort to avoid the injury.* Such failure, with such knowledge of the situation and the probable consequences of the omission to act upon the dictates of prudence and diligence to the end of neutralizing plaintiff's fault and averting disaster, notwithstanding his lack of care, is, strictly speaking, not *negligence* at all, though the term "gross negligence" has been so frequently used as defining it that it is perhaps too late, if otherwise desirable, to eradicate what is said to be an unscientific definition, if not indeed a misnomer; but it is more than any degree of negligence, inattention or inadvertence — which can never mean other than the omission of action without intent, existing or imputed, to commit wrong — it is that recklessness, or wantonness, or worse, which implies a willingness to inflict the impending injury, or a wilfulness in pursuing a course of conduct which will naturally or probably result in disaster, or an intent to perpetrate wrong. The theory of contributory negligence, as a defence, is that, conjointly with *negligence* on the part of the defendant, it conduces to the damnifying result, and defeats any action, the *gravamen* of which is such negligence. If defendant's conduct is not merely negligent, but worse, there is nothing for plaintiff's want of care to contribute to — there is no lack of mere prudence and diligence of like kind on the part of defendant to conjunctively

constitute the efficient cause. Mere negligence on the one hand cannot be said to aid wilfulness on the other. And hence such negligence of a plaintiff is no defence against the consequences of the wilfulness of the defendant. But nothing short of the elements of actual knowledge of the situation on the part of defendant's employés, and their omission of preventive effort after that knowledge is brought home to them, when there is reasonable prospect that such effort will avail, will suffice to avoid the defence of contributory negligence on the part of, or imputable to, the plaintiff.

SECTION IV.

Plaintiff running Risk to save Life of Another, endangered by Defendant's Negligence.

ECKERT *v.* LONG ISLAND R. R. CO.

1871. 43 *New York*, 502.[1]

Appeal from the judgment of the late General Term of the Supreme Court, in the second judicial district, affirming a judgment for the plaintiff in the City Court of Brooklyn, upon the verdict of a jury. Action in the City Court of Brooklyn, by the plaintiff as administratrix of her husband, Henry Eckert, deceased, to recover damages for the death of the intestate, caused as alleged by the negligence of the defendant, its servants and agents, in the conduct and running of a train of cars over its road. The case, as made by the plaintiff, was, that the deceased received an injury from a locomotive engine of the defendant, which resulted in his death, on the 26th day of November, 1867, under the following circumstances:

He was standing in the afternoon of the day named, in conversation with another person about fifty feet from the defendant's track, in East New York, as a train of cars was coming in from Jamaica, at a rate of speed estimated by the plaintiffs' witnesses of from twelve to twenty miles per hour. The plaintiff's witnesses heard no signal either from the whistle or the bell upon the engine. The engine was constructed to run either way without turning, and it was then running backward with the cow-catcher next the train it was drawing, and nothing in front to remove obstacles from the track. The claim of the plaintiff was that the evidence authorized the jury to find that the speed of the train was improper and negligent in that particular place, it being a thickly populated neighborhood, and one of the stations of the road.

The evidence on the part of the plaintiff also showed that a child three or four years old was sitting or standing upon the track of the defendant's road as the train of cars was approaching, and was liable to be run over, if not removed; and the deceased, seeing the danger of the child, ran to it, and seizing it, threw it clear of the track on the side opposite to that from which he came; but continuing across the track himself, was struck by the step or some part of the locomotive or tender, thrown down, and received injuries from which he died the same night.

[1] Citations of counsel omitted. — Ed.

The evidence on the part of defendant tended to prove that the cars were being run at a very moderate speed, not over seven or eight miles per hour, that the signals required by law were given, and that the child was not on the track over which the cars were passing, but on a side track near the main track.

So far as there was any conflict of evidence or question of fact, the questions were submitted to the jury At the close of the plaintiff's case, the counsel for the defendant moved for a nonsuit, upon the ground that it appeared that the deceased's negligence contributed to the injury, and the motion was denied and an exception taken. After the evidence was all in, the judge was requested by the counsel for the defendant to charge the jury, in different forms, that if the deceased voluntarily placed himself in peril from which he received the injury, to save the child, whether the child was or was not in danger, the plaintiff could not recover, and all the requests were refused and exceptions taken, and the question whether the negligence of the intestate contributed to the accident was submitted to the jury. The jury found a verdict for the plaintiff, and the judgment entered thereon was affirmed, on appeal, by the Supreme Court, and from the latter judgment the defendant has appealed to this court.

Aaron J. Vanderpoel, for appellant.

George G. Reynolds, for respondent.

GROVER, J. The important question in this case arises upon the exception taken by the defendant's counsel to the denial of his motion for a nonsuit, made upon the ground that the negligence of the plaintiff's intestate contributed to the injury that caused his death. The evidence showed that the train was approaching in plain view of the deceased, and had he for his own purposes attempted to cross the track, or with a view to save property placed himself voluntarily in a position where he might have received an injury from a collision with the train, his conduct would have been grossly negligent, and no recovery could have been had for such injury. But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself. Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fail and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard

for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent unless such as to be regarded either rash or reckless. The jury were warranted in finding the deceased free from negligence under the rule as above stated. The motion for a nonsuit was, therefore, properly denied. That the jury were warranted in finding the defendant guilty of negligence in running the train in the manner it was running, requires no discussion. None of the exceptions taken to the charge as given, or to the refusals to charge as requested, affect the right of recovery. Upon the principle above stated, the judgment appealed from must be affirmed with costs.

CHURCH, C. J., PECKHAM and RAPALLO, JJ., concur.

[The dissenting opinion of ALLEN, J., concurred in by FOLGER, J., is omitted.]

Judgment affirmed.

SECTION V.

Where Defendant's Continuously Negligent Use of his Land involves Risk of Damage to Plaintiff, if Plaintiff makes Customary Use of his Adjacent Premises.

DONOVAN ET AL. *v.* HANNIBAL & ST. JOSEPH RAILROAD COMPANY, APPELLANT.

1886. 89 *Missouri*, 147.[1]

APPEAL from Buchanan Circuit Court. Hon. J. P. Grubb, Judge.

Smith & Krauthoff, for appellant.

Doniphan & Reed, for respondent.

BLACK, J. This is a suit for double damages under section 809, Revised Statutes,[2] for injuries to cattle. The facts disclosed on the trial are as follows: Defendant's road runs through a farm owned by the plaintiff, Donovan. He enclosed fifty acres by building a fence on three sides, the railroad constituting the fourth side. Before erecting the fence he notified defendant of his intention and requested its proper agents to fence the road, stating at the same time that the land was lower than the track, and if it should rain his cattle would go upon the road. He made a like request after the fence had been completed, saying then that the grass was going to waste. He at the same time offered to build the fence for defendant at its cost, but this proposition was rejected, the agent saying that they were better prepared to build fences than plaintiff. The agent then, as he had before, promised to make the fence. From two to four weeks later Donovan, and McKinley, the other plaintiff, turned some forty head of their cattle on the pasture. A son of one of the plaintiffs paid some attention to the cattle for a time, keeping them off the road. On the night of the third day that the cattle were in the pasture it rained, and they then went on

[1] Arguments omitted. — ED.

[2] "Every railroad corporation . . . shall erect and maintain lawful fences on the sides of the road where the same passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands; . . . and until fences . . . shall be made and maintained, such corporation shall be liable in double the amount of all damages which shall be done by its agents, engines, or cars to . . . animals on said road or by reason of any . . . animals escaping from, or coming upon said lands, fields, or inclosures, occasioned in either case by the failure to construct or maintain such fences. . . . After such fences . . . shall be duly made and maintained, said corporation shall not be liable for any such damage, unless negligently or wilfully done." . . . — Rev. Stat. Missouri, section 809. — ED.

the road, and six or eight were damaged by the defendant's cars running upon them.

The many constitutional questions as to the validity of section 809, raised in the trial Court and preserved in the record, have been so often ruled against the appellant that further notice need not be taken of them.

The defendant offered no evidence, but asked the following instruction, which was refused: —

"The jury are instructed that if the evidence shows that if the plaintiff turned his said stock into his lot where they were injured, knowing that locomotives and trains of cars were running at all hours of the day and night on the defendant's railroad track, and knew that said track crossed his said lot, and that no fence of any kind was on either side of the railroad track, and that such locomotives could not be operated on said track without running near said animals, and that said animals were in danger of receiving injury from such engines and cars, then he was guilty of such negligence as will bar a recovery in this action."

The defendant answered alone by way of a general denial. Contributory negligence is a matter of defence, and must be pleaded to be available as a defence. No such issue of fact was presented in this case, and for these reasons the instruction was properly refused. Had such a defence been stated in the answer, still the instruction should have been refused, for it fails to submit any question of negligence on the part of the plaintiffs to the jurors. It assumes that the facts therein hypothetically stated, in and of themselves, constitute negligence. The facts recited do not necessarily lead to such a conclusion.

Again, the plaintiff had the undoubted right to enclose his pasture and when enclosed to make use of it for a pasture. Those cases cited where animals were at large contrary to some law, and strayed upon the railroad and were killed or damaged, can have no possible application to this case. By statute it is made the duty of the defendant to fence its road, and it is made liable to the owner of cattle for double the amount of all damages done to them occasioned by reason of the failure to fence the road. The landowner may, it is true, build the fence and then recover the value from the railroad company, but there is no duty resting upon him to build the fence. The duty is upon the company, and it cannot shift the duty upon the land proprietor. Neither is the land owner deprived of the use of his lands because of the neglect of the company to construct fences as the law says it shall. As is said in Thompson on Negligence, volume 1, page 531: "There is no negligence in his pasturing his cattle upon his own premises, although he is aware of the defective condition of the fence, which it is the duty of the company to maintain between it and the railroad track. He cannot be deprived of the ordinary and proper use of his property by the failure of the railroad company to perform its duty." The same is equally true where there is a total failure to fence. In every case where the railroad passes through enclosed fields, and is not fenced, there is

more or less danger to cattle and other animals. This danger is known to every man of common observation. If these facts will defeat the owner in a suit under the statute, then the statute ceases to be of any avail to one who is diligent enough to fence up his lands. The statute is designed to furnish a remedy to the owner of the stock, as well as to protect the lives of persons travelling on the railroad. It subserves a double purpose. *Parish* v. *Railroad*, 63 Mo. 286. The principle contended for here by the appellant nullifies the statute as to persons who see fit to enclose their lands. It cannot be the law. Perhaps there are authorities in some of the States which would lead to a different conclusion, but we decline to follow them.

Our conclusion is that there was no evidence in the case to justify the Court, in any event, in giving any instruction upon contributory negligence, though the pleadings had been framed to that end.

The judgment is affirmed. All concur.

KELLOGG *v.* CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

1870. 26 *Wisconsin*, 223 [1]

ACTION to recover damages for destruction of hay, sheds, stables, &c., by a fire alleged to have originated in the negligence of the railway company. Fire was communicated by sparks from railroad engine to dry grass, weeds, &c., which had been allowed to accumulate on defendant's land, on both sides of the track; and thence the fire passed upon plaintiff's land where dry grass and weeds had also been permitted to accumulate. A strong wind was blowing from the track towards plaintiff's buildings, about one hundred and forty rods distant. The dry and combustible matter on the railroad land and on plaintiff's land, together with the wind, served to carry the fire to plaintiff's buildings, &c., which were destroyed.

Trial; verdict and judgment for plaintiff. Defendant appealed.

Pease & Ruger, for appellant.

Williams & Sale, for respondent.

DIXON, C. J. All the authorities agree that the presence of dry grass and other inflammable material upon the way of a railroad, suffered to remain there by the company without cause, is a fact from which the jury may find negligence against the company. The cases in Illinois, cited and relied upon by counsel for the defendant, hold this. They hold that it is proper evidence for the jury, who may find negligence from it, although it is not negligence *per se*. *Railroad Co.* v.

[1] Statement of facts abridged. Arguments omitted. Only such portion of the two opinions of Dixon, C. J., are given as relate to one question. The dissenting opinion of Paine, J., is omitted. — ED.

Shanefelt, 47 Ill. 497; *Illinois Central Railroad Co.* v. *Nunn*, 51 id. 78; *Railroad Co.* v. *Mills*, 42 id. 407; *Bass* v. *Railroad Co.*, 28 id. 9. The Court below ruled in the same way, and left it for the jury to say whether the suffering of the combustible material to accumulate upon the right of way and sides of the track, or the failure to remove the same, if the jury so found, was or was not, under the circumstances, negligence on the part of the company. No fault can be found with the instructions in this respect; and the next question is as to the charge of the Court, and its refusal to charge, respecting the alleged negligence of the plaintiff contributing, as it is said, to the loss or damage complained of. This is the leading and most important question in the case. It is a question upon which there is some conflict of authority.

The facts were, that the plaintiff had permitted the weeds, grass, and stubble, to remain upon his own land immediately adjoining the railway of the defendant. They were dry and combustible, the same as the weeds and grass upon the right of way, though less in quantity, because within the right of way no mowing had ever been done, and the growth was more luxuriant and heavy. The plaintiff had not cut and removed the grass and weeds from his own land, nor ploughed in or removed the stubble, so as to prevent the spread of fire in case the same should be communicated to the dry grass and weeds upon the railroad, from the engines operated by the defendant. The grass, weeds, and stubble, upon the plaintiff's land, together with the wind, which was blowing pretty strongly in that direction, served to carry the fire to the stacks, buildings, and other property of the plaintiff, which were destroyed by it, and which were situated some distance from the railroad. The fire originated within the line of the railroad, and near the track, upon the land of the defendant. It was communicated to the dry grass and other combustible material there, by coals of fire dropped from an engine of the defendant passing over the road. The evidence tends very clearly to establish these facts, and under the instructions the jury must have so found. The plaintiff is a farmer, and, in the particulars here in controversy, conducted his farming operations the same as other farmers throughout the country. It is not the custom anywhere for farmers to remove the grass or weeds from their waste lands, or to plough in or remove their stubble, in order to prevent the spread of fire originating from such causes.

Upon this question, as upon the others, the Court charged the jury that it was for them to say whether the plaintiff was guilty of negligence, and, if they found he was, that then he could not recover. On the other hand, the defendant asked an instruction to the effect that it was negligence *per se* for the plaintiff to leave the grass, weeds, and stubble upon his own land, exposed to the fire which might be communicated to them from the burning grass and weeds on the defendant's right of way, and that for this reason there could be no recovery on the part of the plaintiff. The Court refused to give the instruction, and, I think, rightly. The charge upon this point, as well as upon the other, was quite as favorable to the defendant as the law will permit, and even

more so than some of the authorities will justify. The authorities upon this point are, as I have said, somewhat in conflict. The two cases first above cited from Illinois hold that it is negligence on the part of the adjoining landowner not to remove the dry grass and combustible material from his own land under such circumstances, and that he cannot recover damages where the loss is by fire thus communicated. Those decisions were by a divided Court, by two only of the three judges composing it. They rest upon no satisfactory grounds, whilst the reasons found in the opinions of the dissenting judge are very strong to the contrary. Opposed to these are the unanimous decisions of the courts of New York, and of the English Court of Exchequer, upon the identical point. *Cook* v. *Champlain Transportation Co.*, 1 Denio, 91; *Vaughan* v. *Taff Vale Railway Co.*, 3 Hurl. and Nor. 743; *Same* v. *Same*, 5 id. 679. These decisions, though made many years before the Illinois cases arose, are not referred to in them. The last was the same case on appeal in the Exchequer Chamber, where, although the judgment was reversed, it was upon another point. This one was not questioned, but was affirmed, as will be seen from the opinions of the judges, particularly of Cockburn, C. J., and Willes, J. The reasoning of those cases is, in my judgment, unanswerable. I do not see that I can add anything to it. They show that the doctrine of contributory negligence is wholly inapplicable,— that no man is to be charged with negligence because he uses his own property or conducts his own affairs as other people do theirs, or because he does not change or abandon such use, and modify the management of his affairs, so as to accommodate himself to the negligent habits or gross misconduct of others, and in order that such others may escape the consequences of their own wrong, and continue in the practice of such negligence or misconduct. In other words, they show that no man is to be deprived of the free, ordinary, and proper use of his own property by reason of the negligent use which his neighbor may make of his. He is not his neighbor's guardian or keeper, and not to answer for his neglect. The case put by the Court of New York, of the owner of a lot who builds upon it in close proximity to the shop of a smith, is an apt illustration. Or let us suppose that A. and B. are proprietors of adjoining lands. A. has a dwelling-house, barns, and other buildings upon his, and cultivates some portion of it. B. has a planing mill, or other similar manufacturing establishment upon his, near the line of A., operated by steam. B. is a careless man, habitually so, and suffers shavings and other inflammable material to accumulate about his mills and up to the line of A., and so near to the fire in the mill that the same is liable at any time to be ignited. A. knows this, and remonstrates with B., but B. persists. Upon A.'s land, immediately adjoining the premises of B., it is unavoidable, in the ordinary course of husbandry, or of A.'s use of the land, that there should be at certain seasons of the year, unless A. removes them, dry grass and stubble, which, when set fire to, will endanger his dwelling-house and other property of a combustible nature, especially with the wind

blowing in a particular direction at the time. It may be a very considerable annual expense and trouble to A. to remove them. It may require considerable time and labor, a useless expenditure to him, diverting his attention from other affairs and duties. The constant watching to guard against the carelessness and negligence of B. is a great tax upon his time and patience. The question is: Does the law require this of him, lest, in some unguarded moment, the fire should break out, his property be destroyed, and he be remediless? If the law does so require, if it imposes on him the duty of guarding against B.'s negligence, and of seeing that no injury shall come from it, or, if it does come, that it shall be his fault and not B.'s, it is important to know upon what principle it is that the burden is thus shifted from B. to himself. I know of no such principle, and doubt whether any Court could be found diliberately to announce or affirm it. And yet such is the result of holding the doctrine of contributory negligence applicable to such a case. A. is compelled, all his lifetime, at much expense and trouble, to watch and guard against the negligence of B., and to prevent any injuries arising from it, and for what? Simply that B. may continue to indulge in such negligence at his pleasure. And he does so with impunity. The law affords no redress against him. If the property is destroyed, it is because of the combustible material on A.'s land, which carries the fire, and which is A.'s fault, and A. is the loser. No loss can ever possibly overtake him. A. is responsible for the negligence, but not he himself. He kindles the fire, and A. stands guard over it. He sets the dangerous element in motion, and uses and operates it for his own benefit and advantage, negligently as he pleases, whilst A., with sleepless vigilance, sees to it that no damage is done, or if there is, that he will be the sufferer. This is the *reductio ad absurdum* of applying the doctrine of contributory negligence in such a case. And it is absurd, I care not by what Court or where applied.

Now the case of a railroad company is like the case of an individual. Both stand on the same footing with respect to their rights and liabilities. Both are engaged in the pursuit of a lawful business, and are alike liable for damage or injury caused by their negligence in the prosecution of it. Fire is an agent of an exceedingly dangerous and unruly kind, and, though applied to a lawful purpose, the law requires the utmost care in the use of all reasonable and proper means to prevent damage to the property of third persons. This obligation of care, the want of which constitutes negligence according to the circumstances, is imposed upon the party who uses the fire, and not upon those persons whose property is exposed to danger by reason of the negligence of such party. Third persons are merely passive, and have the right to remain so, using and enjoying their own property as they will, so far as responsibility for the negligence of the party setting the unruly and destructive agent in motion is concerned. If he is negligent, and damage ensues, it is his fault and cannot be theirs, unless they contribute to it by some unlawful or improper act. But the use of their

own property as best suits their own convenience and purposes, or as other people use theirs, is not unlawful or improper. It is perfectly lawful and proper, and no blame can attach to them. He cannot, by his negligence, deprive them of such use, or say to them, "Do this or that with your property, or I will destroy it by the negligent and improper use of my fire." The fault, therefore, in both a legal and moral point of view, is with him, and it would be something strange should the law visit all the consequences of it upon them. The law does not do so, and it is an utter perversion of the maxim *sic utere tuo, etc.*, thus to apply it to the persons whose property is so destroyed by the negligence of another. It is changing it from "So use your own as not to injure another's property," to "So use your own that another shall not injure your property," by his carelessness and negligence. It would be a very great burden to lay upon all the farmers and proprietors of lands along our extensive lines of railway, were it to be held that they are bound to guard against the negligence of the companies in this way,— that the law imposes this duty upon them. Always burdensome and difficult, it would, in numerous instances, be attended with great expense and trouble. Changes would have to be made in the mode of use and occupation, and sometimes the use abandoned, or at least all profitable use. Houses and buildings would have to be removed, and valuable timber cut down and destroyed. These are, in general, very combustible, especially at particular seasons of the year. The presence of these along or near the line of the railroad would be negligence in the farmer or proprietor. In the event of their destruction by the negligence of the company, he would be remediless. He must remove them, therefore, for his own safety. His only security consists in that. He must remove everything combustible from his own land in order that the company may leave all things combustible on its land and exposed without fear of loss or danger to the company to being ignited at any moment by the fires from its own engines. If this duty is imposed upon the farmers and other proprietors of adjoining lands, why not require them to go at once to the railroad and remove the dry grass and other inflammable material there? There is the origin of the mischief, and there the place to provide securities against it. It is vastly easier, by a few slight measures and a little precaution, to prevent the conflagration in the first place than to stay its ravages when it has once begun, particularly if the wind be blowing at the time, as it generally is upon our open prairies. With comparatively little trouble and expense upon the road itself, a little labor bestowed for that purpose, the mischief might be remedied. And this is an additional reason why the burden ought not to be shifted from the company upon the proprietor of the adjoining land; although, if it were otherwise, it certainly would not change what ought to be the clear rule of law upon the subject.

And the following cases will be found in strict harmony with those above cited, and strongly to sustain the principles there laid down, and for which I contend: *Martin* v. *Western Union Railroad Co.*, 23 Wis.

437; *Piggott* v. *Eastern Counties R. R. Co.*, 54 E. C. L. 228; *Smith* v. *London and Southwestern R. R. Co.*, Law Reports, 5 C. P. 98; *Vaughan* v. *Menlove*, 7 C. & P. 525 [32 E. C. L. 613]; *Hewey* v. *Nourse*, 54 Me. 256; *Turberville* v. *Stampe*, 1 Ld. Raym. 264; s. c. 1 Salk. 13; *Pantam* v. *Isham*, id. 19; *Field* v. *N. Y. C. R. R.*, 32 N. Y. 339; *Bachelder* v. *Heagan*, 18 Maine, 32; *Barnard* v. *Poor*, 21 Pick. 378; *Fero* v. *Buffalo and State Line R. R. Co.*, 22 N. Y. 209; *Fremantle* v. *The London and Northwestern R. R. Co.*, 100 E. C. L. 88; *Hart* v. *Western Railroad Co.*, 13 Met. 99; *Ingersoll* v. *Stockbridge & Pittsfield R. R. Co.*, 8 Allen, 438; *Perley* v. *Eastern Railroad Co.*, 98 Mass. 414; *Hooksett* v. *Concord Railroad*, 38 N. H. 242; *McCready* v. *Railroad Co.*, 2 Strobh. Law R. 356; *Cleaveland* v. *Grand Trunk Railway Co.*, 42 Vt. 449; 1 Bl. Comm. 131; Com. Dig. Action for Negligence (A. 6).

It is true that some of these cases arose under statutes creating a liability on the part of railroad companies, but that does not affect the principle. Negligence in the plaintiff, contributing to the loss, is a defence to an action under the statutes, the same as to an action at common law. 8 Allen, 440; 6 id. 87.

COLE, J., concurred.

PAINE, J., delivered a dissenting opinion.

Judgment affirmed.

Defendants moved for a rehearing.

Pease & Ruger argued in support of the motion.

DIXON, C. J. (Sept. 21, 1871.) . . .

The learned counsel . . . argue that, if logically carried out, the doctrine would utterly abrogate the rule that a party cannot recover damages where, by the exercise of ordinary care, he could have avoided the injury; and so, in the present case, after discovering the fire, the plaintiff might have leaned on his plough-handles and watched its progress, without effort to stay it, where such effort would have been effectual, and yet have been free from culpable negligence. The distinction is between a known, present, or immediate danger, arising from the negligence of another, — that which is imminent and certain, unless the party does or omits to do some act by which it may be avoided, — and a danger arising in like manner, but which is remote and possible or probable only, or contingent and uncertain, depending on the course of future events, such as the future conduct of the negligent party, and other as yet unknown and fortuitous circumstances. The difference is that between realization and anticipation. A man in his senses, in face of what has been aptly termed a "seen danger" (Shearman and Redfield, § 34, note 1), that is, one which presently threatens and is known to him, is bound to realize it, and to use all proper care and make all reasonable efforts to avoid it, and if he does not, it is his own fault; and he having thus contributed to his own loss or injury, no damage can be recovered from the other party, however negligent the latter may have been. But, in case of a danger

of the other kind, one which is not "seen," but exists in anticipation merely, and where the injury may or may not accrue, but is probable or possible only from the continued culpable negligence of another, there the law imposes no such duty upon the person who is or may be so exposed, and he is not obliged to change his conduct or the mode of transacting his affairs, which are otherwise prudent and proper, in order to avoid such anticipated injuries or prevent the mischiefs which may happen through another's default and culpable want of care.

Rehearing denied.

CHAPTER VIII.

IMPUTED CONTRIBUTORY NEGLIGENCE.

SECTION I.

Whether Passenger is barred by the Contributory Negligence of Officer of Ship or of Driver of Omnibus.

THE BERNINA.

[In the Court of Appeal.]

1887. *Law Reports*, 12 *Probate Division*, 58.[1]

Appeal from a judgment of Butt, J. (in the Probate, Divorce, and Admiralty Division, reported in 11 Prob. Div. 31), on a special case stated for the opinion of the Court, in three actions brought *in personam* against the owners of the steamer Bernina.

Butt, J., held, on the authority of *Thorogood* v. *Bryan*, 8 C. B. 115, that the plaintiffs were unable to recover against the defendants, and dismissed the actions.

The plaintiffs appealed.

Bucknill, Q. C., and *Nelson*, for plaintiffs.

Sir W. Phillimore and *Barnes*, for defendants.

Lindley, L. J. This was a special case. Three actions are brought in the Admiralty Division of the High Court by the respective legal personal representatives of three persons on board the Bushire against the owners of the Bernina. Those persons were killed by a collision between the two vessels, both of which were negligently navigated. One of the three persons (Toeg) was a passenger on the Bushire; one (Armstrong) was an engineer of the ship, though not to blame for the collision. The third (Owen) was her second officer, and was in charge of her, and was himself to blame for the collision. The questions for decision are, whether any, and if any, which of these actions can be maintained? and if any of them can, then whether the claims recoverable are to be awarded according to the principles which prevail at common law, or according to those which are adopted in the Court of Admiralty in cases of collision.

[The learned judge then decides that although actions under Lord Campbell's Act for causing death can now be brought in the Admiralty Division, yet the assessment of damages is to be governed by the rules prevailing in common-law actions.]

Having cleared the ground thus far, it is necessary to return to the statute and see under what circumstances an action upon it can be supported. The first matter to be considered is whether there has been

[1] Statement of case abridged. Arguments omitted. — Ed.

any such wrongful act, neglect, or default of the defendants as would, if death had not ensued, have entitled the three deceased persons respectively to have sued the defendants. Now, as regards one of them, namely, Owen, the second officer, who was himself to blame for the collision, it is clear that, if death had not ensued, he could not have maintained an action against the defendants. There was negligence on his part contributing to the collision, and no evidence to show that, notwithstanding his negligence, the defendants could, by taking reasonable care, have avoided the collision. There was what is called such contributory negligence on his part as to render an action by him unsustainable. It follows, therefore, that his representatives can recover nothing under Lord Campbell's Act for his widow and children, and their action cannot be maintained. The other two actions are not so easily disposed of. They raise two questions: (1) Whether the passenger Toeg, if alive, could have successfully sued the defendants; and if he could, then (2) whether there is any difference between the case of the passenger and that of the engineer Armstrong. The learned judge whose decision is under review felt himself bound by authority to decide both actions against the plaintiffs. The authorities which the learned judge followed are *Thorogood* v. *Bryan*, 8 C. B. 115, and *Armstrong* v. *Lancashire & Yorkshire Ry. Co.*, Law Rep. 10 Ex. 47; and the real question to be determined is whether they can be properly overruled or not. *Thorogood* v. *Bryan*, *supra*, was decided in 1849, and has been generally followed at Nisi Prius ever since when cases like it have arisen. But it is curious to see how reluctant the Courts have been to affirm its principle after argument, and how they have avoided doing so, preferring, where possible, to decide cases before them on other grounds. See, for example, *Rigby* v. *Hewitt*, 5 Ex. 240; *Greenland* v. *Chaplin*, 5 Ex. 243; *Waite* v. *North Eastern Ry. Co.*, E. B. & E. 719. I am not aware that the principle on which *Thorogood* v. *Bryan*, *supra*, was decided has ever been approved by any Court which has had to consider it. On the other hand, that case has been criticised and said to be contrary to principle by persons of the highest eminence, not only in this country, but also in Scotland and in America. And while it is true that *Thorogood* v. *Bryan*, *supra*, has never been overruled, it is also true that it has never been affirmed by any Court which could properly overrule it, and it cannot be yet said to have become indisputably settled law. I do not think, therefore, that it is too late for a Court of Appeal to reconsider it, or to overrule it if clearly contrary to well settled legal principles.

Thorogood v *Bryan*, *supra*, was an action founded on Lord Campbell's Act. The facts were shortly as follows. The deceased was a passenger in an omnibus, and he had just got off out of it. He was knocked down and killed by another omnibus belonging to the defendants. There was negligence on the part of the drivers of both omnibuses, and it appears that there was also negligence on the part of the deceased himself. The jury found a verdict for the defendants, and there

does not seem to have been any reason why the Court should have disallowed the verdict if not driven to do so on technical grounds. In those days, however, a misdirection by the judge to the jury compelled the Court to grant a new trial, whether any injustice had been done or not; and accordingly the plaintiff moved for a new trial on the ground of misdirection, and it is with reference to this point that the decision of the Court is of importance. The learned judge who tried the case told the jury in effect to find for the defendant if they thought that the deceased was killed either by reason of his own want of care or by reason of want of care on the part of the driver of the omnibus out of which he was getting. The last direction was complained of, but was upheld by the Court. The *ratio decidendi* was that if the death of the deceased was not occasioned by his own negligence it was occasioned by the joint negligence of both drivers, and that, if so, the negligence of the driver of the omnibus off which the deceased was getting was the negligence of the deceased; and the reason for so holding was that the deceased had voluntarily placed himself under the care of the driver. Maule, J., puts it thus: "The deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and the negligence of the driver was the negligence of the deceased." This theory of identification was quite new. No trace of it is to be found in any earlier decision, nor in any legal treatise, English or foreign, so far as I have been able to ascertain, nor has it ever been satisfactorily explained. It must be assumed, for the purpose of considering the grounds of the decision in question, that the passenger was not himself in fault. Assuming this to be so, then, if both drivers were negligent, and both caused the injury to the passenger, it is difficult to understand why both drivers or their masters should not be liable to him. The doctrine of identification laid down in *Thorogood* v. *Bryan*, *supra*, is, to me, quite unintelligible. It is, in truth, a fictitious extension of the principles of agency, but to say that the driver of a public conveyance is the agent of the passengers is to say that which is not true in fact. Such a doctrine, if made the basis of further reasoning, leads to results which are wholly untenable, *e. g.*, to the result that the passengers would be liable for the negligence of the person driving them, which is obviously absurd, but which, of course, the Court never meant. All the Court meant to say was that for purposes of suing for negligence the passenger was in no better position than the man driving him. But why not? The driver of a public vehicle is not selected by the passenger otherwise than by being hailed by him as one of the public to take him up; and such selection, if selection it can be called, does not create the relation of principal and agent or master and servant between the passenger and the driver, the passenger knows nothing of the driver and has no control over him; nor is the driver in any proper sense employed by the passenger. The driver, if not his own master, is hired, paid, or employed by the owner of the vehicle he drives or by some other person who lets the vehicle to him. The orders

he obeys are his employer's orders. These orders, in the case of an omnibus, are to drive from such a place to such a place and take up and put down passengers; and in the case of a cab the orders are to drive where the passenger for the time being may desire to go, within the limits expressly or impliedly set by the employer. If the passenger actively interferes with the driver by giving him orders as to what he is to do, I can understand the meaning of the expression that the passenger identifies himself with the driver, but no such interference was suggested in *Thorogood* v. *Bryan*, *supra*. The principles of the law of negligence, and in particular of what is called contributory negligence, have been discussed on many occasions since that case was decided, and are much better understood now than they were thirty years ago. *Tuff* v. *Warman*, 5 C. B. (N. S.) 573, in the Exchequer Chamber, and *Radley* v. *London & North Western Ry. Co.*, 1 App. Cas. 754, in the House of Lords, show the true grounds on which a person himself guilty of negligence is unable to maintain an action against another for an injury occasioned by the combined negligence of both. If the proximate cause of the injury is the negligence of the plaintiff as well as that of the defendant, the plaintiff cannot recover anything. The reason for this is not easily discoverable. But I take it to be settled that an action at common law by A. against B. for injury directly caused to A. by the want of care of A. and B. will not lie. As Pollock, C. B., pointed out in *Greenland* v. *Chaplin*, *supra*, the jury cannot take the consequences and divide them in proportion according to the negligence of the one or the other party. But if the plaintiff can show that although he has himself been negligent, the real and proximate cause of the injury sustained by him was the negligence of the defendant, the plaintiff can maintain an action, as is shown not only by *Tuff* v. *Warman*, *supra*, and *Radley* v. *London & North Western Ry. Co.*, *supra*, but also by the well-known case of *Davies* v. *Mann*, 10 M. & W. 546, and other cases of that class. The cases which give rise to actions for negligence are primarily reducible to three classes, as follows: —

1. A. without fault of his own is injured by the negligence of B., then B. is liable to A. 2. A. by his own fault is injured by B. without fault on his part, then B. is not liable to A. 3. A. is injured by B. by the fault more or less of both combined; then the following further distinctions have to be made: (*a*.) if, notwithstanding B.'s negligence, A. with reasonable care could have avoided the injury, he cannot sue B.: *Butterfield* v. *Forrester*, 11 East, 60; *Bridge* v. *Grand Junction Ry. Co.*, 3 M. & W. 244; *Dowell* v. *General Steam Navigation Co.*, 5 E. & B. 195; (*b*.) if, notwithstanding A.'s negligence, B. with reasonable care could have avoided injuring A., A. can sue B.: *Tuff* v. *Warman*, *supra*; *Radley* v. *London & North Western Ry. Co.*, *supra*; *Davies* v. *Mann*, *supra*; (*c*.) if there has been as much want of reasonable care on A.'s part as on B.'s, or, in other words, if the proximate cause of the injury is the want of reasonable care on both sides, A.

cannot sue B. In such a case A. cannot with truth say that he has been injured by B.'s negligence, he can only with truth say that he has been injured by his own carelessness and B.'s negligence, and the two combined give no cause of action at common law. This follows from the two sets of decisions already referred to. But why in such a case the damages should not be apportioned, I do not profess to understand. However, as already stated, the law on this point is settled, and not open to judicial discussion. If now another person is introduced the same principles will be found applicable. Substitute in the foregoing cases B. and C. for B., and unless C. is A.'s agent or servant there will be no difference in the result, except that A. will have two persons instead of one liable to him. A. may sue B. and C. in one action, and recover damages against them both; or he may sue them separately and recover the whole damage sustained against the one he sues: *Clark* v. *Chambers*, 3 Q. B. D. 327, where all the previous authorities were carefully examined by the late L. C. J. Cockburn. This is no doubt hard on the defendant, who is alone sued, and this hardship seems to have influenced the Court in deciding *Thorogood* v. *Bryan, supra*. In that case the Court appears to have thought it hard on the defendant to make him pay all the damages due to the plaintiff, and that it was no hardship to the plaintiff to exonerate the defendant from liability, as the plaintiff had a clear remedy against the master of the omnibus in which he was a passenger. But it is difficult to see the justice of exonerating the defendant from all liability in respect of his own wrong and of throwing the whole liability on some one who was no more to blame than he. The injustice to the defendant, which the Court sought to avoid, is common to all cases in which a wrong is done by two people and one of them alone is made to pay for it. The rule which does not allow of contribution among wrong-doers is what produces hardship in these cases, but the hardship produced by that rule (if really applicable to such cases as these under discussion) does not justify the Court in exonerating one of the wrong-doers from all responsibility for his own misconduct or the misconduct of his servants. I can hardly believe that if the plaintiff in *Thorogood* v. *Bryan*, *supra*, had sued the proprietors of both omnibuses it would have been held that he had no right of action against one of them. Having given my reasons for my inability to concur in the doctrine laid down in *Thorogood* v. *Bryan*, *supra*, I proceed to consider how far that doctrine is supported by other authorities. [After commenting on various authorities]; *Thorogood* v. *Bryan*, *supra*, and *Armstrong* v. *Lancashire & Yorkshire Ry. Co.*, *supra*, affirm that, although if A. is injured by the combined negligence of B. and C., A. can sue B. and C., or either of them, he cannot sue C. if he, A., is under the care of B. or in his employ. From this general doctrine I am compelled most respectfully to dissent, but if B. is A.'s agent or servant the doctrine is good. In Scotland the decision in *Thorogood* v. *Bryan*, *supra*, was discussed and held to be unsatisfactory in the case of *Adams* v. *Glasgow &*

South Western Ry. Co., 3 Court Sess. Cas. 215. In America the subject was recently examined with great care by the Supreme Court of the United States in *Little* v. *Hackett*, 14 Am. Law Record, 577, 54 Am. Rep. 15, in which the English and American cases were reviewed, and the doctrine laid down in *Thorogood* v. *Bryan*, *supra*, was distinctly repudiated as contrary to sound principles. In this case the plaintiff was driving in a hackney carriage and was injured by a collision between it and a railway train on a level crossing. There was negligence on the part of the driver of the carriage and on the part of the railway company's servants, but it was held that the plaintiff was not precluded from maintaining an action against the railway company. In this country *Thorogood* v. *Bryan*, *supra*, was distinctly disapproved by Dr. Lushington in *The Milan*, Lush. 388; and even Lord Bramwell, who has gone further than any other judge in upholding the decision, has expressed disapproval of the grounds on which it was based. No text-writer has approved of it, and the comments in Smith's Leading Cases are adverse to it (vol. i. p. 266, 6th ed.). For the reasons above stated, I am of opinion that the doctrines laid down in *Thorogood* v. *Bryan*, *supra*, and *Armstrong* v. *Lancashire & Yorkshire Ry. Co.*, *supra*, are contrary to sound legal principles, and ought not to be regarded as law. Consequently, I am of opinion that the decision in Toeg's and Armstrong's case ought to be reversed.

Concurring opinions were delivered by Lord Esher, M. R., and Lopes, L. J., the former elaborately reviewing the authorities.

Extract from opinion of Lopes, L. J.: —

If, again, the passenger is to be considered in the same position as the driver or owner, and their negligence is to be imputed to him, he would be liable to third parties; for instance, in case of a collision between two omnibuses, where the driver of one was entirely in fault, every passenger in the omnibus free from blame would have an action against every passenger in the other omnibus, because every such passenger would be identified with the driver, and is responsible for his negligence. Nor, again, in the case just put, could any passenger in the other omnibus bring an action against the owner of the omnibus in which he was carried, because the negligence of the driver is to be imputed to the passenger. If the negligence of the driver is to be attributed to the passenger for one purpose, it would be impossible to say he is not to be affected by it for others. Other cases might be put.

The more the decision in *Thorogood* v. *Bryan*, *supra*, is examined, the more anomalous and indefensible that decision appears.

The theory of the identification of the passengers with the negligent driver or owner is, in my opinion, a fallacy and a fiction, contrary to sound law and opposed to every principle of justice. A passenger in an omnibus whose injury is caused by the joint negligence of that omnibus and another, may, in my opinion, maintain an action, either against the owner of the omnibus in which he was carried or the other omnibus, or both. I am clearly of opinion *Thorogood* v. *Bryan*, *supra*, should be overruled.

Extract from opinion of Lord Esher, M. R.: —

In Armstrong's action a point is suggested that he ought not to recover against the defendants, the owners of the Bernina, because he could not recover against the owners of the Bushire. He would, it is rightly said, in an action against the latter, be met by the doctrine of the accident being occasioned by the negligence of a fellow-servant. The suggestion would go too far. It would apply where passengers or goods are carried by railway, or in ship, under a notice limiting the liability of that railway company or shipowner. It would work manifest injustice by enabling a person to take advantage of a contract to which he was a stranger, and for the advantage of which he had given no consideration. The rule of law is, that a person injured by more than one wrong-doer may maintain an action for the whole damage done to him against any of them. There is no condition that he cannot do so unless he might, if he pleased, maintain an action against each of them. There is no disadvantage to the one sued, because there is no contribution between joint wrong-doers. The plaintiff Armstrong is therefore entitled to judgment for the whole of the damages he may be able to prove, according to the rule of damages laid down in Lord Campbell's Act. So in the case of the plaintiff Toeg. In the case of Owen, the deceased was personally negligent, so as that his negligence was partly directly a cause of the injury. He could not have recovered, neither can his administratrix. *Appeal allowed.*

Affirmed in the House of Lords under the name of *Mills* v. *Armstrong;* L. R. 13 App. Cases, 1.

SECTION II.

Whether Person in Carriage by Invitation of Driver is barred by Contributory Negligence of Driver.

SHULTZ *v.* OLD COLONY STREET RAILWAY COMPANY.

1907. 193 *Massachusetts*, 309.[1]

TORT for personal injuries caused by the collision of an electric car of defendant with a carriage in which the plaintiff was being driven.

At the trial the evidence for plaintiff tended to show that plaintiff was being driven in a carriage by her friend B; that B owned the horse and carriage and was giving her a ride to her home; that plaintiff in no way interfered with B's driving, in no manner controlled him or directed how he should drive, but left the driving to him; and that the defendant's car from behind, without any warning, ran into the hind wheels of the carriage.

Defendant's evidence tended to show that the collision was due to B's negligently turning suddenly across the track.

The judge instructed the jury (*inter alia*) that if B was careless in driving and if his carelessness contributed to the injury, then plaintiff was bound by his carelessness and could not recover. To this instruction plaintiff excepted. sustained

Verdict for defendant.

D. R. Radovsky, for plaintiff.

J. M. Swift, for defendant.

RUGG, J. This case fairly raises the question as to whether the negligence of the driver of a vehicle is to be imputed to a guest, riding with him gratuitously, and personally in the exercise of all the care which ordinary caution requires.

[The learned judge then elaborately reviewed the authorities; and, both upon authority and principle, sustained the view reached in *The Bernina*, *ante*. He then continued:]

The rule fairly deducible from our own cases, and supported by the great weight of authority by courts of other jurisdictions, is that where an adult person, possessing all his faculties and personally in the exercise of that degree of care, which common prudence requires under all the attending circumstances, is injured through the negligence of some third person and the concurring negligence of one with whom

[1] Statement abridged. Greater part of opinion omitted. — ED.

the plaintiff is riding as guest or companion, between whom and the plaintiff the relation of master and servant or principal and agent, or mutual responsibility in a common enterprise, does not in fact exist, the plaintiff being at the time in no position to exercise authority or control over the driver, then the negligence of the driver is not imputable to the injured person, but the latter is entitled to recover against the one through whose wrong his injuries were sustained. Disregarding the passenger's own due care, the test whether the negligence of the driver is to be imputed to the one riding depends upon the latter's control or right of control of the actions of the driver, so as to constitute in fact the relation of principal and agent or master and servant, or his voluntary, unconstrained, non-contractual surrender of all care for himself to the caution of the driver.

Applying this statement of the law to the present case, the result is that the plaintiff would not be entitled to recover if in the exercise of common prudence she ought to have given some warning to the driver of carelessness on his part, which she observed or might have observed in exercising due care for her own safety, nor if she negligently abandoned the exercise of her own faculties and trusted entirely to the vigilance and care of the driver. She cannot hide behind the fact that another is driving the vehicle in which she is riding, and thus relieve herself of her own negligence. What degree of care she should have exercised, in accepting the invitation to ride, or in observing and calling to the attention of the driver perils unnoticed by him, depends upon the circumstances at the time of the injury. On the other hand, she would be permitted to recover if, in entering and continuing in the conveyance, she acted with reasonable caution, and had no ground to suspect incompetency and no cause to anticipate negligence on the part of the driver, and if the impending danger, although in part produced by the driver, was so sudden or of such a character as not to permit or require her to do any act for her own protection.

In view of the facts of the case the requests for rulings presented by the plaintiff were not correct propositions of law and were properly refused, but the portion of the charge excepted to failed to express with accuracy and fulness the rights of the plaintiff and the liability of the defendant to her. The jury were instructed to treat the plaintiff as identified with the driver, and burdened with his negligence. For the reasons we have stated and under the circumstances disclosed, this was not an accurate statement of the law.

Exceptions sustained.

EMMA KOPLITZ *v.* CITY OF ST. PAUL.

1902. 86 *Minnesota*, 373.

ACTION in the District Court for Ramsey County to recover $2040 for personal injuries caused by a defective street in defendant city. The case was tried before Brill, J., and a jury, which rendered a general verdict in favor of plaintiff for $300. The jury also returned a special verdict, in answer to the specific question submitted by the court, that the driver of the vehicle from which plaintiff was thrown was guilty of negligence which contributed to the injury. From a judgment entered pursuant to the general verdict, defendant appealed.

James E. Markham, Franklin H. Griggs and *Thomas McDermott*, for appellant.

Charles H. Taylor, for respondent.

START, C. J. The plaintiff was one of a party of twenty-six young people who celebrated the Fourth of July last by a picnic at Lake Johanna, about twelve miles from St. Paul. The picnic was a mutual affair, in that the party consisted of about an equal number of young men and young women, each lady being invited and escorted by a gentleman, for whom and herself she furnished lunch; but at meal time the several lunches were merged, and became a common spread. The ladies had nothing to do with the matter of the transportation of the party to and from the lake. This was the exclusive business of the gentlemen, with which the ladies had no more to do than the young men had with the lunches. The gentlemen selected one of their number (Mr. Gibbons) to manage the transportation of the party. He hired for this purpose a long covered omnibus, drawn by four horses, and a driver and assistant, to drive the party to the lake and return. The party were driven to and from the lake in this conveyance, with the hiring of which, or the payment therefor, or the control thereof, the ladies, including the plaintiff, had nothing to do, other than may be inferred, if at all, from the fact that they were members of the picnic party. On the return trip, when the conveyance had reached Dale Street, in the city of St. Paul, it was tipped over, by reason of an embankment therein, whereby the plaintiff was injured.

At the time of the accident all of the party were riding inside of the omnibus, except Mr. Gibbons, who was outside, on the driver's seat, with the driver and his assistant, and was then driving the horses; but this fact was unknown to the plaintiff or any of the party inside of the conveyance. The negligence of the city in the care of the street was the proximate cause of the plaintiff's injury, but the negligence of Mr. Gibbons in driving the horses contributed thereto. The plaintiff was personally free from any negligence in the premises. This action was brought by the plaintiff to recover damages on account of such injuries, and the jury returned a verdict for $300, and a special

verdict that Mr. Gibbons was guilty of contributory negligence in driving the conveyance. Thereupon the defendant moved for judgment in its favor upon the special verdict, notwithstanding the general verdict for the plaintiff. The motion was denied, and judgment entered for the plaintiff, from which the defendant appealed to this court.

The only question for our decision is whether the negligence of Mr. Gibbons must be imputed to the plaintiff, and a recovery denied her for that reason. The rule as to imputed negligence, as settled by this court in cases other than those where the parties stand in the relation of parent and child or guardian and ward, is that negligence in the conduct of another will not be imputed to a party if he neither authorized such conduct, nor participated therein, nor had the right or power to control it. If, however, two or more persons unite in the joint prosecution of a common purpose under such circumstances that each has authority, expressed or implied, to act for all in respect to the control of the means or agencies employed to execute such common purpose, the negligence of one in the management thereof will be imputed to all the others. *Follman* v. *City of Mankato*, 35 Minn. 522, 29 N. W. 317; *Flaherty* v. *Minneapolis & St. L. Ry. Co.*, 39 Minn. 328, 40 N. W. 160; *Howe* v. *Minneapolis, St. P. & S. Ste. M. Ry. Co.*, 62 Minn. 71, 64 N. W. 102; *Johnson* v. *St. Paul City Ry. Co.*, 67 Minn. 260, 69 N. W. 900; *Finley* v. *Chicago, M. & St. P. Ry. Co.*, 71 Minn. 471, 74 N. W. 174; *Wosika* v. *St. Paul City Ry. Co.*, 80 Minn. 364, 83 N. W. 386; *Lammers* v. *Great Northern Ry. Co.*, 82 Minn. 120, 84 N. W. 728.

It is too obvious to justify discussion that the plaintiff in this case neither expressly nor impliedly had any control over the drivers of the omnibus, or either of them, or of Mr. Gibbons, and that he and she were not engaged in a joint enterprise in any such sense as made her so far responsible for his negligence in driving the horses that it must be imputed to her. The claim of the defendant to the contrary is unsupported by the facts as disclosed by the record.

Judgment affirmed.[1]

[1] According to the decision in *Shindelus* v. *St. Paul City R. Co.*, A. D. 1900, 80 Minn. 364, if any of the young men of the party in the Koplitz case had sued the city, the negligence of Gibbons would have been imputed to them. — Ed.

FECHLEY *v.* SPRINGFIELD TRACTION COMPANY.

1906. 119 *Missouri Appeals*, 358.[1]

In the St. Louis Court of Appeals. Error to Circuit Court, Greene County. Verdict and judgment for defendant. Plaintiff appeals.

Appellant, Fechley, was damaged by the collision of a street car with a one-horse buggy in which he was riding. The buggy was owned and driven by Pierce, at whose invitation Fechley was riding. Pierce, upon his own statement, was negligent in not seasonably looking, or taking proper precautions, to ascertain if a car was approaching before he attempted to drive across two parallel railway tracks. The facts as to the alleged negligence of Fechley are sufficiently stated in the extracts from the opinion, given below.

One error assigned was the submission to the jury of the issue of appellant's contributory negligence.

A. H. Wear and *J. T. White*, for appellant.

Delaney & Delaney, for respondent.

Goode, J. [After stating the case; and *holding* that the negligence of Pierce would not bar Fechley from recovering against the company if the motorman's negligence was in part the proximate cause of the collision.]

Appellant himself must have been free from negligence proximately contributing to his injury or he is entitled to no damages, granting that Pierce's fault does not preclude a recovery and that the motorman's fault was a factor in bringing about the casualty. Few, if any, courts have held that an occupant of a vehicle may entrust his safety absolutely to the driver of a vehicle, regardless of the imminence of danger or the visible lack of ordinary caution on the part of the driver to avoid harm. The law in this state, and in most jurisdictions, is that if a passenger who is aware of the danger and that the driver is remiss in guarding against it, takes no care himself to avoid injury, he cannot recover for one he receives. This is the law not because the driver's negligence is imputable to the passenger, but because the latter's own negligence proximately contributed to his damage. [*Marsh* v. *Railroad*, 104 Mo. App. 577, 78 S. W. 284; *Dean* v. *Railroad*, 129 Pa. St. 514; *Township of Crescent* v. *Anderson*, 114 Pa. St. 643; *Keohler* v. *Railroad*, 66 Hun, 566; *Hoag* v. *Railroad*, 111 N. Y. 179; *Brickell* v. *Railroad*, 120 N. Y. 290; 2 Thompson, Negligence, sec. 1620; Beach, Con. Neg., sec. 115; 3 Elliott, Railroads, sec. 1174.]

[After discussing the pleadings.]

Therefore the question occurs whether, on the testimony for appellant, the court would have been justified in holding him guilty of con-

[1] Statement abridged. Arguments omitted; also portions of opinion. — Ed.

tributory negligence; and we hold that such a ruling would have been proper. Appellant swore he knew cars were operated east and west on Commercial Street, but did not know there were double tracks on it. The two tracks were right before his eyes as he drove down Commercial Street and as Pierce turned the horse to cross them. He said he could have looked out of the buggy by merely pushing the curtain back with his hand. He was not bound to do this if Pierce's conduct was of such a character as to induce a reasonably prudent man to think there was no danger in driving across the tracks. But Fechley did not have the right to rely on the precaution taken by Pierce, unless, under the circumstances, a man of ordinary prudence would have relied on it. As we have pointed out, the testimony shows Pierce took no precaution which could be effective. He did not stop at all; nor did he look for a car until the horse was stepping over the south rail of the north track. The two tracks were less than five feet apart and the buggy moved but a few feet after Pierce looked, before the car struck it near the front of the rear wheels. Meanwhile Fechley was leaning back in the buggy, though he must have seen they had crossed the south track and were advancing diagonally on the north one, and, if he was paying any attention to the situation, must have known that a car was likely to come along on that track from the east. Pierce's behavior was so grossly careless, that Fechley was imprudent in doing nothing personally to insure his safety. The essential fact is that Pierce did not look in time, as Fechley knew, or, in reason, ought to have known. Therefore Fechley should have stopped Pierce or told him to look for a car, or have looked himself, before they had advanced so far into danger. It is palpable from appellant's own testimony that he was giving no heed to his safety, but either was relying blindly on Pierce, or, for some reason, was not aware of the proximity of the tracks.

[After stating authorities.]

On the testimony for appellant the case strikes us as one of concurrent negligence; for the buggy had not gone more than from six to twelve feet after Pierce looked for a car, until the collision occurred. There is an inconsistency in appellant's theory. He would have it that there was an appearance of danger of a collision which should have warned the motorman, as soon as the buggy was turned to go over the tracks and before Pierce looked for a car, but that appellant himself was not negligent in failing to guard against this apparent danger. That argument for appellant emphasizes and makes clear his own carelessness. The counsel in the case give several close calculations in support of their respective theories, and appellant's attorneys endeavor to demonstrate that the motorman could have stopped the car before it reached the buggy, if he had begun to get control of it when the horse turned to go over the south track. They insist that appellant, though he may have been guilty of contributory negligence, was entitled to a finding by the jury, under proper instructions, on the

issue of whether or not the motorman could have prevented the accident after the turn, it being assumed that the danger of a collision then became apparent. The court submitted that issue by a charge which was extremely favorable to appellant.

[Omitting remainder of opinion.]

Judgment affirmed.

SECTION III.

Whether Bailor is barred by Contributory Negligence of Bailee.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* SIMS.

1899. 77 *Mississippi*, 325.

FROM the Circuit Court of Madison County.

HON. ROBERT POWELL, Judge.

Sims, the appellee, was the plaintiff in the court below; the railroad company was defendant there. Although the evidence tended to show contributory negligence on the part of the borrower who had possession of the mule in question at the time of the injury, the court below granted a peremptory instruction in favor of the plaintiff, who was the owner of the animal, presumably on the view that the borrower's negligence could not be imputed to the plaintiff.

Mayes & Harris, for the appellant.

In this case the driver of the mule was a mere gratuitous bailee. In such case there is such privity between the bailee and the bailor that a recovery by one in an action for trespass is a bar to an action by the other. *Baggett* v. *McCormick*, 73 Miss. 552; *Chesley* v. *Sinclair*, 1 N. H. 189; *Bissell* v. *Huntington*, 2 Ib. 399; *Woodman* v. *Notingham*, 49 Ib. 142; *Harrington* v. *King*, 141 Mass. 269; *Johnson* v. *Holyoke*, 105 Ib. 80; Schouler on Bailment, p. 65; 3 Am. & Eng. Enc. L. (2d ed.), 762.

Manifestly, under these authorities what would be a defence in a suit by one party would be a defence in a suit by the other. A judgment at the suit of either would be a bar to a suit by the other. Especially would this rule apply to a case like the one at bar of a mere gratuitous bailee who borrowed the animal of another party and drove it negligently upon a railroad track, where it was injured. The defence of contributory negligence would be a valid defence against the bailee in a suit by him suing for the benefit of the bailor, and it would be equally a valid defence in a suit by the bailor suing in his own right.

H. B. Greaves, for the appellee.

The facts did not show a case of contributory negligence. Moreover, Dixon, the driver of the mule at the time of the injury, was neither the servant nor the agent of the appellee. *Alabama, etc., Railway Co.* v. *Davis*, 69 Miss. 444.

WOODS, C. J., delivered the opinion of the court.

It appears that the appellee had loaned his mule to one Dixon, to be used by him, Dixon, in hauling sand, and that while so using the

animal, for the purpose for which it was loaned, the injury was inflicted which resulted in its death.

The case is one of injury by a stranger to a bailor's property in the hands and care of a bailee, and the question to be determined is, if the bailee was guilty of contributory negligence in the act complained of, is his contributory negligence imputable to the bailor?

Acting within the scope of his employment, the negligence of the agent is imputed to his principal, that of the servant to his master, and that of a bailee for hire to the bailor.

Why the contributory negligence of a gratuitous bailee, while using the property for the very purpose for which it was loaned, should not be imputed to the bailor who intrusted it to the bailee to be thus used, we are unable to see. There is the same privity of contract, in all essential features, as in bailment for hire, and as in engagements between principal and agent, and between master and servant.

This view is reinforced by the consideration of another question, viz.: Could a gratuitous bailee who was guilty of contributory negligence recover in his own name against a stranger for an injury to property loaned? Clearly not, for the defence to his complaint would be upon the surface. But the bailor and the bailee must recover, if at all, on the same facts and under the same circumstances. We have held that the bailee may, in a proper case, recover in his own name, but of course for the benefit of his bailor; or that the bailor may himself sue in his own name. *Baggett* v. *McCormick*, 73 Miss. 552. Whatever entitles to a recovery, entitles either bailor or bailee to such recovery. *E converso*, whatever forbids a recovery to the bailee will also defeat the bailor's action.

The evidence offered by the appellant tended to show that Dixon, the bailee in charge of the mule, and using it in accordance with the terms of the bailment, was guilty of contributory negligence in the act of injury, and if this had been satisfactorily established, then this negligence must be imputed to Paul Sims, the bailor, and should defeat a recovery.

The evidence should have been submitted to the jury, that it might have passed upon the question of Dixon's contributory negligence, and because this was not done, the case will be

Reversed and remanded for a new trial.

NEW YORK, LAKE ERIE & WESTERN R. R. CO. *v.* NEW JERSEY ELECTRIC R. CO.

1897. 60 *New Jersey Law*, 338.[1]

LIPPINCOTT, J. In this case the action is brought by the New York, Lake Erie and Western Railroad Company by its receiver against the defendant to recover damages sustained by the locomotive engine and cars of the plaintiff, in a collision between the locomotive engine and an electric car of the defendant company, at a crossing over a public highway, at Singac, in Passaic County, on September 2, 1895. The locomotive and some of the cars of the train belonged to the plaintiff company, and by it had been hired by the day, and from day to day, for use, to the New York and Greenwood Lake Railway Company, which latter company was, with its own engineer, fireman, and employees, running the same over and upon its own roadbed and rails at such highway crossing at the time and place of collision.

. . . . . .

The jury by their special verdict found negligence of the employees of the defendant company causing the accident; also that the negligence of the employees of the New York and Greenwood Lake Railway Company contributed thereto; and also that the plaintiff company had suffered damage to the amount of $1475.

On this verdict the *postea* was framed, and the motion now is for judgment thereon.

. . . . . .

But the defendant distinctly contends that the negligence of the bailee or its servants in the operation of this locomotive and train of cars by reason of this bailment, contributing to the injury, is imputable to the bailor and prevents a recovery on the part of the bailor against the defendant as a third party, who is a joint wrongdoer with the bailee. This joint negligence by the special verdict is found to have been the cause of the collision and injury, and, therefore, the case must be considered with the fact of the contributing negligence of the bailee established.

In a contract of bailment of things for hire, the bailor is not responsible to a third party for injuries occurring to such third party by reason of the negligent use of the thing hired by the bailee, nor for the negligence of the servants of the bailee in respect thereto. The bailee does not stand in the place of the bailor nor represent him in such relation as to render the bailor liable for such injuries, nor are the servants of the bailee the servants of the bailor or in any sense acting for him, and the contract of bailment is in so far entirely an independent one, and the liabilities of the bailor and bailee to third parties are essentially independent of each other.

[1] Only part of the case is given.—ED.

In this case it cannot be contended that the plaintiff company would have been responsible to the defendant if the negligent use of the locomotive by the servants of the New York and Greenwood Lake Railway had occasioned an injury to the defendant's car at this crossing. This negligence, however much the occasion of the injury to the defendant, could not have rendered the plaintiff company responsible so long as, in this case, no act or conduct of the plaintiff company was in question. It did not, in fact, advise, encourage or permit in the hands of its bailee the negligent use of this locomotive.

The contributory negligence of a third person can only be set up in a defence when it is legally imputable to the plaintiff, and its existence must depend upon some connection or relation between the plaintiff and the third person from which such legal responsibility may arise. It is a general rule that it is no justification of the misconduct of the defendant that some third person, a stranger, was also in the wrong. The negligence of the servant in the course of his master's employment is imputable to the master, and so as between agent and principal. But the negligence of one passenger in a car standing alone, inflicting injury upon another passenger, is not imputable to the railroad company, a common carrier of passengers. There must exist concurring negligence in some respect, in the railroad company. *Sheridan* v. *Brooklyn, &c.*, 36 N. Y. 39; *Cannon* v. *Midland and Great Western Railway Co.*, L. R., 6 Ir. 199. If the defendant be negligent, the fact that the negligence of others coöperated or concurred with it in effecting the wrong does not affect the question or measure of liability. *Mott* v. *Hudson River Railroad Co.*, 8 Bosw. 345; *Atkinson* v. *Goodrich Transportation Co.*, 60 Wis. 141.

It may be deemed to be settled in this state that the employees or servants of a bailee are not the servants of the bailor in any such relation as to make the bailor liable to third parties for their negligence or misconduct in relation to the thing bailed. As where A hired a coach and horses with a driver from B, to take his family on a particular journey, and in the course of the journey, in crossing the track of a railroad, the coach was struck by a passing train and A was injured. In an action by A against the railroad company for damages it was held that the relation of master and servant did not exist between the plaintiff and the driver, and that the negligence of the driver, coöperating with that of the persons in charge of the train which caused the accident, was not imputable to the plaintiff as contributory negligence to bar his action. It was further held that for whatever purpose the negligence was invoked, whether as an action for injury done by the driver, or as contributory negligence to bar the action by the passenger, against the third person for an injury sustained, the negligence to be imputed to the passenger must be such as arises in some manner from his own conduct.

The negligence of the driver, without some coöperating negligence on his part, cannot be imputed to the passenger in virtue of the simple

act of hiring. *New York, Lake Erie & Western Railroad Co.* v. *Steinbrenner*, 18 Vroom 161; *Bennett* v. *New Jersey Railroad Company*, 7 Id. 225.

There is no perceivable distinction between the case in hand and the cases last cited. Both rest upon a contract of bailment for the hire of a thing for use, and although a contract mutually beneficial to each of the parties, they are so independent of each other that the negligence of one cannot be imputable to the other.

It is only when the contributory negligence is of such a character and the third person is so connected with the plaintiff that an action might be maintained against the plaintiff for damages for the consequences of such negligence, then when the plaintiff brings the action, that negligence is, in contemplation of law, the plaintiff's negligence, and it is justly imputed to him.

This relation does not exist between the bailor and bailee under the ordinary contract of bailment.

. . . . . .

There is a line of cases in which the peculiar contractual relations between a shipper of goods and the common carrier thereof *locatio operis mercium vehendarum*, who is liable to the shipper against all events except the acts of God or the public enemy, or the natural wear and tear of the article shipped, and responsible for all the consequences of his conduct as an insurer against loss except from such excepted causes, which hold the carrier alone responsible for injury. The shipper, according to such authorities, cannot recover against a third party for negligence in the care of such goods or injuries to them.

The distinction between the relation which exists in law between the shipper and the common carrier of goods and the bailment for hire of a chattel for use is so obvious as not to need discussion. The carriage of goods is, by all legal writers, classed as a different contract of bailment having peculiarities, and governed by principles characteristic of the relation quite apart from the contract of bailment of chattels for hire.

The cases cited by the defendant are *Vander Plank* v. *Miller*, 1 Moo. & M. 169; *Simpson* v. *Hand*, 6 Whart. 311; *Transfer Company* v. *Kelly*, 36 Ohio St. 86; *Arctic Fire Insurance Co.* v. *Austin*, 69 N. Y. 470. These cases are all cases which arise under the contract of bailment for the carriage of goods and chattels, not by a special, but by a common carrier.

He is treated as an insurer against all but the excepted perils (Jones Bailm. 101), and the shipper cannot look beyond him for liability, and this rule is said to be grounded upon public policy.

. . . . . .

The conclusion reached is that the plaintiff had the right to sue either or both these companies for the injuries arising from their negligence to the locomotive and cars of the plaintiff, and it is not a defence to the action that the accident was contributed to by the neg-

ligence of the other. Each is liable upon its own negligence, and the negligence of the bailee is not imputable to the plaintiff as a shield to the defendant against recovery.

Judgment must be entered on *postea* for the damages found by the jury.

[Judgment affirmed in Court of Errors upon the opinion in the Supreme Court. 61 N. J. Law, 287.]

SECTION IV.

Whether Child is barred by Contributory Negligence of Parent or Custodian.

NEWMAN *v.* PHILLIPSBURG HORSE CAR COMPANY.

1890. 52 *New Jersey Law Reports* (23 *Vroom*), 446.

THE plaintiff was a child two years of age; she was in the custody of her sister, who was twenty-two; the former, being left by herself for a few minutes, got upon the railroad track of the defendant, and was hurt by the car. The occurrence took place in a public street of the village of Phillipsburg. The carelessness of the defendant was manifest, as at the time of the accident there was no one in charge of the horse drawing the car, the driver being in the car collecting fares.

The Circuit judge submitted the three following propositions to this Court for its advisory opinion, viz.: —

First. Whether the negligence of the persons in charge of the plaintiff, an infant minor, should be imputed to the said plaintiff.

Second. Whether the conduct of the persons in charge of the plaintiff at the time of the injury complained of, was not so demonstrably negligent that the said Circuit Court should have nonsuited the plaintiff, or that the Court should have directed the jury to find for the defendant.

Third. Whether a new trial ought not to be granted, on the ground that the damages awarded are excessive.

Argued at February term, 1890, before BEASLEY, C. J., and SCUDDER, DIXON and REED, JJ.

Messrs. Shipman & Son, for the plaintiff.

William H. Morrow, for the defendant.

The opinion of the court was delivered by —

BEASLEY, C. J. There is but a single question presented by this case, and that question plainly stands among the vexed questions of the law.

The problem is, whether an infant of tender years can be vicariously negligent, so as to deprive itself of a remedy that it would otherwise be entitled to. In some of the American states this question has been answered by the Courts in the affirmative, and in others in the negative. To the former of these classes belongs the decision in *Hartfield* v. *Roper & Newell*, reported in 21 Wend. 615. This case appears to have been one of first impressions on this subject, and it is to be regarded, not

only as the precursor, but as the parent of all the cases of the same strain that have since appeared.

The inquiry with respect to the effect of the negligence of the custodian of the infant, too young to be intelligent of situations and circumstances, was directly presented for decision in the primary case thus referred to, for the facts were these: The plaintiff, a child of about two years of age, was standing or sitting in the snow in a public road, and in that situation was run over by a sleigh driven by the defendants. The opinion of the Court was, that as the child was permitted by its custodian to wander into a position of such danger it was without remedy for the hurts thus received, unless they were voluntarily inflicted, or were the product of gross carelessness on the part of the defendants. It is obvious that the judicial theory was, that the infant was, through the medium of its custodian, the doer, in part, of its own misfortune, and that, consequently, by force of the well-known rule, under such conditions, he had no right to an action. This, of course, was visiting the child for the neglect of the custodian, and such infliction is justified in the case cited in this wise: "The infant," says the Court, "is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; in respect to third persons his act must be deemed that of the infant; his neglects the infant's neglects."

It will be observed that the entire content of this quotation is the statement of a single fact, and a deduction from it, the premise being, that the child must be in the care and charge of an adult, and the inference being that, for that reason, the neglects of the adult are the neglects of the infant. But surely this is, conspicuously, a *non sequitur*. How does the custody of the infant justify, or lead to, the imputation of another's fault to him? The law, natural and civil, puts the infant under the care of the adult, but how can this right to care for and protect be construed into a right to waive, or forfeit, any of the legal rights of the infant? The capacity to make such waiver or forfeiture is not a necessary, or even convenient, incident of this office of the adult, but, on the contrary, is quite inconsistent with it, for the power to protect is the opposite of the power to harm, either by act or omission. In this case in Wendell it is evident that the rule of law enunciated by it is founded in the theory that the custodian of the infant is the agent of the infant; but this is a mere assumption without legal basis, for such custodian is the agent, not of the infant, but of the law. If such supposed agency existed, it would embrace many interests of the infant, and could not be confined to the single instance where an injury is inflicted by the co-operative tort of the guardian. And yet it seems certain that such custodian cannot surrender or impair a single right of any kind that is vested in the child, nor impose any legal burthen upon it. If a mother travelling with her child in her arms should agree with a railway company, that in case of an accident to such infant by reason of the joint negligence of herself and the

company the latter should not be liable to a suit by the child, such an engagement would be plainly invalid on two grounds; *first*, the contract would be *contra bonos mores*, and, *second*, because the mother was not the agent of the child authorized to enter into the agreement. Nevertheless, the position has been deemed defensible that the same evil consequences to the infant will follow from the negligence of the mother, in the absence of such supposed contract, as would have resulted if such contract should have been made and should have been held valid.

In fact, this doctrine of the imputability of the misfeasance of the keeper of a child to the child itself, is deemed to be a pure interpolation into the law, for until the case under criticism it was absolutely unknown; nor is it sustained by legal analogies. Infants have always been the particular objects of the favor and protection of the law. In the language of an ancient authority this doctrine is thus expressed: "The common principle is, that an infant in all things which sound in his benefit shall have favor and preferment in law as well as another man, but shall not be prejudiced by anything in his disadvantage." 9 Vin. Abr. 374. And it would appear to be plain that nothing could be more to the prejudice of an infant than to convert, by construction of law, the connection between himself and his custodian into an agency to which the harsh rule of *respondeat superior* should be applicable. The answerableness of the principal for the authorized acts of his agent is not so much the dictate of natural justice as of public policy, and has arisen, with some propriety, from the circumstances, that the creation of the agency is a voluntary act, and that it can be controlled and ended at the will of its creator. But in the relationship between the infant and its keeper, all these decisive characteristics are wholly wanting. The law imposes the keeper upon the child who, of course, can neither control or remove him, and the injustice, therefore, of making the latter responsible, in any measure whatever, for the torts of the former, would seem to be quite evident. Such subjectivity would be hostile, in every respect, to the natural rights of the infant, and, consequently, cannot, with any show of reason, be introduced into that provision which both necessity and law establish for his protection. Nor can it be said that its existence is necessary to give just enforcement to the rights of others. When it happens that both the infant and its custodian have been injured by the co-operative negligence of such custodian and a third party, it seems reasonable, at least in some degree, that the latter should be enabled to say to the custodian, "You and I, by our common carelessness, have done this wrong, and, therefore, neither can look to the other for redress;" but when such wrong-doer says to the infant, "Your guardian and I, by our joint misconduct, have brought this loss upon you, consequently you have no right of action against me, but you must look for indemnification to your guardian alone," a proposition is stated that appears to be without any basis either in good sense or law. The conversion of the infant, who is entirely free from fault, into a

wrong-doer, by imputation, is a logical contrivance uncongenial with the spirit of jurisprudence. The sensible and legal doctrine is this: An infant of tender years cannot be charged with negligence; nor can he be so charged with the commission of such fault by substitution, for he is incapable of appointing an agent, the consequence being, that he can, in no case, be considered to be the blamable cause, either in whole or in part, of his own injury. There is no injustice, nor hardship, in requiring all wrong-doers to be answerable to a person who is incapable either of self-protection or of being a participator in their misfeasance.

Nor is it to be overlooked that the theory here repudiated, if it should be adopted, would go the length of making an infant in its nurse's arms answerable for all the negligences of such nurse while thus employed in its service. Every person so damaged by the careless custodian would be entitled to his action against the infant. If the neglects of the guardian are to be regarded as the neglects of the infant, as was asserted in the New York decision, it would, from logical necessity, follow, that the infant must indemnify those who should be harmed by such neglects. That such a doctrine has never prevailed is conclusively shown by the fact that in the reports there is no indication that such a suit has ever been brought.

It has already been observed that judicial opinion, touching the subject just discussed, is in a state of direct antagonism, and it would, therefore, serve no usual purpose to refer to any of them. It is sufficient to say, that the leading text-writers have concluded that the weight of such authority is adverse to the doctrine that an infant can become, in any wise, a tortfeasor by imputation. 1 Shearm. & R. Neg., § 75; Whart. Neg., § 311; 2 Wood Railw. L., p. 1284.

In our opinion, the weight of reason is in the same scale.

It remains to add that we do not think the damages so excessive as to place the verdict under judicial control.

Let the Circuit Court be advised to render judgment on the finding of the jury.

Welch, J., in BELLEFONTAINE & INDIANA RAILROAD CO. *v.* SNYDER.

1868. 18 *Ohio State*, 408–409.

It is well settled that an adult person capable of self-control cannot recover for injuries occasioned by negligence, where he has himself also been guilty of negligence which contributed to the result. This rule of law is founded upon reason and considerations of justice and public policy, which it seems to us are wholly inapplicable to the case of an infant plaintiff. These reasons and considerations are: 1. The mutuality of the wrong, entitling each party alike, where both are injured,

to his action against the other, if it entitles either; 2. The impolicy of allowing a party to recover for his own wrong; and, 3. The policy of making the personal interests of parties dependent upon their own prudence and care. All these are wanting in the case of an infant plaintiff. No action can be maintained against him for the negligence of his parent or custodian; and it is difficult to perceive what principle of public policy is to be subserved, or how it can be reconciled with justice to the infant, to make his personal rights dependent upon the good or bad conduct of others. It is the old doctrine of the father eating grapes, and the child's teeth being set on edge. The strong objection to it is its palpable injustice to the infant. Can it be true, and is such the law, that if only one party offends against an infant he has his action, but that if two offend against him, their faults neutralize each other, and he is without remedy? His right is to have an action against both.

BISAILLON *v.* BLOOD.

1888. 64 *New Hampshire*, 565.

CASE, for the negligent injury of the plaintiff. Verdict for the defendant.

In October, 1886, the defendant, while driving a horse in a carriage on a public street of Manchester, ran over and injured the plaintiff, an infant then five years old, who had wandered from his home without an attendant or custodian, and was playing in the street with other children of about the same age.

The jury were instructed that the plaintiff being too young to exercise care for himself, it was the duty of his parents or natural guardians to exercise care and prudence for him to prevent his being injured, and if they were negligent in this respect, and their neglect contributed to produce the injury complained of, he cannot recover. To these instructions the plaintiff excepted. Sustained

J. B. Pattee and *J. P. Bartlett*, for the plaintiff.

Sulloway & Topliff, for the defendant.

CARPENTER, J. The plaintiff would be entitled to damages for the defendant's negligent injury of his property similarly exposed to danger by the carelessness of his guardian. *Davies* v. *Mann*, 10 M. & W. 546; *Smith* v. *Railroad*, 35 N. H. 366, 367; *Giles* v. *Railroad*, 55 N. H. 555. An infant of such tender years as to be incapable of exercising care is not less under the protection of the law than his chattel. The previous negligence of the plaintiff's parents was immaterial. The only question for the jury was whether the defendant by the exercise of ordinary care could have prevented the injury; if she could not, she was without fault, and is not liable; if she could, she is liable whether the plaintiff was in the street by reason of, or without, his

parents' negligence. In cases of this character, where an irresponsible child or an idiot is, by the negligence of the parent or guardian, exposed to peril without an attendant, or where a chattel is in like manner placed by the owner in a dangerous position, and either is injured by the act of a "voluntary agent present and acting at the time" (*State* v. *Railroad*, 52 N. H. 528, 557), the question of contributory negligence is not involved. The only question is, whether the defendant by ordinary care could or could not have prevented the injury. *Nashua Iron & S. Co.* v. *Nashua Railroad*, 62 N. H. 159, and cases cited.

Exceptions sustained.

SECTION V.

Whether Parent's Action for Loss of Child's Services is barred by Contributory Negligence of Parent.

GLASSEY *v.* HESTONVILLE, &c., RAILWAY CO.

1868. 57 *Pennsylvania State Reports*, 172.[1]

Error to District Court of Philadelphia.

Action by William Glassey against Railway Company to recover for loss of his son's services, alleged to have been incurred by reason of his being hurt by collision in the street with the company's car. The son, four years of age, was alone in the street at the time of the injury. Defendants requested (among others) the following instruction: —

Knowingly to allow a child of less than four years of age to go at large in the public street, without a protector, is such negligence in his parents or guardians as will prevent the parent from recovering in an action brought by him for loss of service, by reason of injuries to such child.

The Court declined to give the instruction.

Verdict for plaintiff.

I. Hazlehurst, for plaintiffs in error.

C. Hart, for defendant in error.

Strong, J. In *Smith* v. *O'Connor*, 12 Wright, 223, we said that when an action is brought by a father for an injury to his infant son, it may be that the father should be treated as a concurrent wrong-doer. The evidence may reveal him as such. His own fault may have contributed as much to the injury of the child, and consequently to the loss of service due him, as did the fault of the defendant. He owes to the child protection. It is his duty to shield it from danger, and his duty is the greater, the more helpless and indiscreet the child is. If by his own carelessness, his neglect of the duty of protection, he contributes to his own loss of the child's services, he may be said to be *in pari delicto* with a negligent defendant. We hold such to be the law. Though an infant of tender years may recover against a wrong-doer for an injury which was partly caused by his own imprudent act, an adult father cannot. And it makes no difference whether the injury of which he complains was to his absolute, or to his relative rights.

Protection then being a paternal duty, entire failure to extend it must

[1] Statement of facts abridged. Citations of counsel omitted. — Ed.

be negligence. Generally what is and what is not negligence is a question for a jury. When the standard of duty is a shifting one, a jury must determine what it is as well as find whether it has been complied with. Not so when the law determines precisely what the extent of duty is, and there has been no performance at all. Now it would be strange were we not to hold that knowingly to permit a child less than four years old to run at large and without any protector, in the public streets of a large city, traversed constantly by railway cars and other vehicles, is not a breach of parental duty. A father has no right to expose his child to such dangers, and if he does, he fails in performance of his duty, and is guilty of negligence. The security of the community, and especially of children, demands the assertion of this doctrine. Nor is it novel. It has several times been avowed in the courts of New York and Massachusetts, and it is so reasonable that it commends itself to universal acceptance. The points submitted to the Court below should therefore have been affirmed. They were abstract, it is true, but they were applicable to this case if the jury found the facts as they might have found them.

Judgment reversed, and a venire de novo awarded.

SECTION VI.

Whether Parent's Action for Loss of Child's Services is barred by Contributory Negligence of Child.

[SUIT by a father, himself free from negligence, to recover for loss of services of his minor child, alleged to be occasioned by defendant's negligence. Is the father's action barred by the child's contributory negligence? It has repeatedly been taken for granted that the father is barred; but no full discussion has been found in any case. In *Pratt C. & I. Co.* v. *Brawley*, 83 Alabama, 371, p. 374, CLOPTON, J., said: "Whenever the plaintiff derives his cause of action from an injury to a third person, the contributory negligence of such third person is imputable to him, so as to charge him with the consequences." See, also, *Burke* v. *Broadway, &c., R. Co.*, 49 Barbour, 529; *Oakland, &c., R. Co.* v. *Fielding*, 48 Pa. State, 320; *Kennard* v. *Burton*, 25 Maine, 39; *Marbury Lumber Co.* v. *Westbrook*, 121 Ala. 179; *Dietrich* v. *Baltimore, &c., R. Co.*, 58 Maryland, 347, p. 358; *Honegsberger* v. *2d Avenue R. Co.*, 2 Abbott App. (N. Y.) 378, p. 382.

Professor Bigelow formerly considered it "doubtful in principle" whether any negligence of the child "would bar an action against another by the parent, as a master, for loss of service caused, though in part only, by the defendant's negligence." Bigelow, Torts, 6th ed., p. 385. In a subsequent edition he says: "It may be" that the child's negligence would bar the parents' action. 7th ed. 406.

Dr. Bishop says: ". . . . since the party inflicting the injury has in himself no equity to set up the defence of contributory negligence, and since the plaintiff in the case now supposed was guilty of no conscious or criminal wrong, the misfortune of having a negligent child should not debar him from pursuing his legal claim for damages. Still it is sometimes taken for granted, without much consideration, that a father in these circumstances cannot recover for the injury; but probably the question is open for further judicial discussion." Bishop on Non-Contract Law, sect. 584.]

SECTION VII.

Whether Husband's Action for Loss of Wife's Services is barred by Contributory Negligence of Wife.
Whether Wife's Action for Personal Damage is barred by Contributory Negligence of Husband.

CHICAGO, B. & Q. R. R. *v.* HONEY.

1894. 27 *U. S. Appeals*, 196. Reversing 59 *Fed. Rep.* 423.[1]

In U. S. Circuit Court of Appeals for Eighth Circuit. Before Caldwell and Sanborn, Circuit Judges, and Thayer, District Judge.

This action was brought in the U. S. Circuit Court for Western Division of Southern District of Iowa, by W. O. B. Honey, against the C., B. & Q. R. R., to recover damages for the loss of the society and services of his wife, who had suffered personal injury through the alleged negligence of the railroad. Mrs. Honey was struck by a switch engine while she was going towards the depot to take passage on a train. She brought suit to recover for the injury to her person. For trial purposes, the two cases were "consolidated" and tried before the same jury. In both cases the defendant pleaded that the negligence of Mrs. Honey contributed to the accident. The jury were instructed that if Mrs. Honey, by negligence on her part, had contributed to the accident, she could not recover; but that negligence on her part would not defeat the action on behalf of her husband. The jury found for defendant in the suit brought by the wife, and for plaintiff in the suit brought by the husband. A motion for a new trial in the latter case was denied by Shiras, District Judge. Judgment having been entered for the husband, the R. R. Co. brought error.

Portions of the opinion of Shiras, J., in the Circuit Court (reported in 59 Fed. Rep. 423), may be summarized as follows: —

Under the statutes of Iowa, the wife must sue alone for bodily damage to herself caused by defendant's negligence. Her suit is entirely distinct from the husband's action to recover for expenses incurred in taking care of the wife and for the loss of her society and services.

The wife must sue alone upon the cause of action accruing to her, and so also must the husband. A judgment rendered in the one case cannot be availed of even as evidence, and much less as an adjudica-

[1] Statement rewritten. Portions of opinion omitted. — Ed.

tion, in the other.[1] The payment of damages in the one case has no legal effect upon the damages to be awarded in the other. The admissions or statements of the wife, not forming part of the "res gestæ," are not admissible as evidence against the plaintiff in the suit by the husband, although they are evidence against the plaintiff in the suit brought by the wife; and so also the admissions of the husband, though provable against him, are not admissible in the suit of the wife. In all particulars the right of action accruing to the wife and that accruing to the husband are separate and distinct.

. . . . . .

The right of action on behalf of the husband to recover the damages resulting to him never belonged to the wife. She could not assign or release the same. The husband's right of action is based upon the invasion of his rights, and recovery is sought of the consequential damages caused him. The legal injury complained of is that caused to the husband, and not that caused to the wife. The argument of counsel that the right of action in favor of the husband is derived from the wife, and that the latter is the source of his title and claim, is not well founded. The physical injury caused to the person of Mrs. Honey must not be confounded with the legal injury resulting therefrom to her husband. The pain, suffering and lameness caused by the accident to Mrs. Honey are injuries to her, and do not create a right of action in favor of her husband. When, however, the accident to the wife resulted in depriving the husband of her society, and of her aid in conducting the affairs of his household, and he was put to expense in securing proper surgical care for his wife, then his legal rights were invaded, and for the damages consequent therefrom a right of action accrued to him, which was wholly separate and distinct from that accruing to the wife. The negligence of the wife cannot, therefore, be availed of as a defence to the husband's action on the ground that he stands in the position of an assignee or representative of a right of action accruing to the wife, or upon the theory that his right of action is derived through her. The husband's right of action legally and logically is based upon the negligence of the defendant, resulting in an invasion of his legal rights, and not upon any right of action accruing to or derived from the wife.

. . . . . .

Here the wife was not acting as agent for her husband. She was acting in her own right for a purpose personal to herself. As is pointed out in *Little* v. *Hackett*, 116 U. S. 366, to constitute the relation of principal and agent in such sense that the negligence of the latter can be imputed to the former, the relation must be such that responsibility to third parties would attach to the principal for injuries resulting from the negligence of the agent; or, to apply the rule to this case, the relation must be such that W. O. B. Honey would be liable

[1] See *Brierly* v. *Union R. Co.*, 26 R. I. 119; *Duffee* v. *Boston El. R. Co.*, 191 Mass. 563; *Selleck* v. *City of Janesville*, 104 Wis. 570. — Ed.

to third parties for injuries caused them by the negligence of Ellen Honey.

. . . . . .

Section 2205 of the Code of Iowa abrogates the common law liability of the husband for the acts of the wife, and there is no longer any legal liability on part of the husband to third parties for the consequence of her negligent acts, simply on the ground that she is his wife. To hold the husband responsible for the consequences of her negligence, it must appear that he would be responsible if he was not her husband. . . . In the case now under consideration, suppose the facts had been that the company was not in fault, but that Mrs. Honey had negligently gotten in front of the engine when going to the depot, and that the engine had been derailed and injured, and the persons in charge thereof had likewise suffered personal injuries, could the company or the injured persons recover damages from W. O. B. Honey, on the ground that the accident was due to the negligence of Mrs. Honey? ——

John N. Baldwin and *Smith McPherson* (*J. W. Blythe* with them), for plaintiff in error.

Charles M. Harl (*J. M. Junkin*, *C. E. Richards*, and *Harl & McCabe* with him), for defendant in error.

THAYER, District Judge. . . . The learned judge of the trial court appears to have been of opinion that a husband suing for the loss of the services of his wife and for medical expenses occasioned by the negligence of a third party is, in the state of Iowa at least, unaffected by the fact that the wife was guilty of contributory negligence, because the laws of that state have abolished the legal fiction of the identity of husband and wife, and have exempted the husband from responsibility for the negligence and misfeasance of the wife. 59 Fed. Rep. 423. It becomes necessary, therefore, to determine whether this view is tenable.

Whenever the question has heretofore been considered, it seems to have been taken for granted that the relation existing between husband and wife, or parent and child, is of such a character that the plea of contributory negligence on the part of the wife or child, if the latter is of sufficient age and intelligence to be chargeable with negligence, is a good defence, when the husband or parent brings a common-law action to recover for the loss of services or for medical expenses consequent upon physical injuries sustained by the wife or child through the concurring fault of another. The following are some of the cases, and doubtless there are others, where this principle has been recognized and enforced: *The Cleveland, Columbus & Cincinnati Railroad Company* v. *Terry*, 8 Ohio St. 570; *Dietrich* v. *The Baltimore and Hall's Springs Railway Company*, 58 Maryland, 347; *Benton* v. *The C., R. I. & P. R. Co.*, 55 Iowa, 496; *Pratt Coal & Iron Co.* v. *Brawley*, 83 Alabama, 371; *Gilligan* v. *The New York and Harlem Railroad Company*, 1 E. D. Smith, 453.

In none of the cases last cited was the reason of the rule stated, nor was the subject much discussed. It seems to have been taken for granted that the concurring negligence of the injured party was a sufficient defence to a suit by the husband or parent, when suing merely for the loss of the services of the injured party, or for medical expenses incurred and paid by him in the discharge of his obligation as husband or parent. But the weight to be given to these decisions as authority is not impaired by the fact that the rule stated and applied was not much discussed. On the contrary, the fact that the doctrine applied to the decision of the cases in question was assumed to be correct both by court and counsel may be taken as an expression of the general understanding of the profession that the doctrine is well established and founded in reason. If we look for the true foundation of the rule in question, we apprehend that it will not be difficult to find. When one person occupies such a relation to another rational human being that he is legally entitled to her society and services, and to maintain a suit for the deprivation thereof, he should not be permitted to recover in such an action, if the loss was occasioned by the concurring negligence of the person on whose account the right of action is given. If the person from whom the right of service and society is derived is capable of taking ordinary precautions to insure her own safety, and the person to whom the right of service belongs suffers her to go abroad unattended and to exercise her own faculties of self-preservation, it is no more than reasonable to hold him responsible in a suit for loss of society and services for the manner in which such faculties have been exercised. We can conceive of no greater reason for deciding, in a case of this character, that a husband is not accountable for the conduct of his wife in caring for the safety of her own person than there would be for holding that he was not chargeable with her contributory negligence in the management of a horse and carriage belonging to the husband, which she had been permitted to use for her own pleasure and convenience. In either case the fact that the husband has permitted the wife to control her own movements and to take precautions for her own safety, upon the evident assumption that she is competent to do so, should preclude him from asserting, in a suit against a third party for loss of services or society, or for a loss of property, that he is not responsible for her contributory fault whereby the loss was occasioned.

In this connection it is worthy of notice that in the state of Iowa, where this case originated, and in some other states as well, it is held that the husband's contributory fault is imputable to the wife in a suit brought by her against a third party for injuries sustained through the concurrent negligence of such third party and her husband. By the Iowa courts it is said that the husband's negligence is imputable to the wife under such circumstances, because of the marital relation which entitles her to his care and protection. *Yahn* v. *City of Ottumwa*, 60 Iowa, 429, as explained in *Nisbet* v. *The Town of Garner*,

75 Iowa, 314, 316. See also *Peck* v. *The New York, New Haven and Hartford Railroad Company*, 50 Connecticut, 379; *Carlisle* v. *Sheldon*, 38 Vermont, 440, 447. In other jurisdictions it has been decided that the husband's contributory negligence is not thus imputable to the wife when she sues in her own right for injuries sustained under the circumstances last mentioned. *Shaw* v. *Craft*, 37 Fed. Rep. 317; *Sheffield* v. *Central Union Telephone Co.*, 36 Fed. Rep. 164; *Flori* v. *City of St. Louis*, 3 Missouri, App. 231, 240; *The Louisville, New Albany and Chicago Railway Company* v. *Creek*, 130 Indiana, 139. We do not regard it as material to the decision of the case at bar to determine what the true doctrine is with refereuce to the point last mentioned, for, even if we should concede it to be the better view that the husband's contributory negligeuce is not imputable to the wife when she sues in her own right for an injury sustained, still we think that it would not be a reasonable deduction from this rule that the husband is likewise unaffected by the wife's negligence when he sues for loss of services and medical expenses; for when the wife brings an action for personal injuries which she has sustained, the right of action is in nowise dependent upon the marital relation; she does not derive her right to sue from that relation, but brings suit like any other person for an injury sustained through the fault of another. At common law, it was necessary for the wife to be joined as plaintiff in such a suit, because she was regarded as the meritorious cause of action. Bingham on Infancy and Coverture (2d Am. ed.), 247, and cases there cited. But, ou the other hand, the husband's right to sue for loss of society and services grows out of the marital relation and is incident to the rights thereby acquired. It has its origin in the existence of a valid marriage, which relation entitles him to the benefit of the wife's services and society, and which also imposes on him the duty of providing her with medical attendance in case of sickness or accident. When the husband loses the services of his wife or is compelled to incur medical expenses through the fault of another, then he may sue the wrong-doer. The right of action is incident to the marriage relation and cannot exist without it.

We think, therefore, that, even if it is the better view that the husband's contributory negligence cannot be imputed to the wife when she sues for her own injuries, yet that, when the husband brings an action for the loss of his wife's society and services, which loss was due to the contributory fault of the wife, her want of ordinary care should nevertheless be imputed to the husband on the grounds heretofore indicated. As the respective rights of action are predicated on different grounds, the one growing out of the marriage relation and the other existing entirely independent of that relation, there is no logical difficulty in holding the husband accountable for the contributory negligence of the wife, although the latter is not responsible for the contributory fault of her husband.

. . . . . .

[After referring to various Iowa statutes.] These laws have eman-

cipated the wife from many of her common-law disabilities, and have given her an individuality apart from her husband which she did not before possess in the eye of the law; but we think that it is a mistake to suppose that these statutes were intended to extinguish, or that they have in fact utterly extinguished, the reciprocal obligations and rights of husband and wife which were formerly incident to the marriage relation. If it is true, as has been intimated, that the statutes in question free the parties to the marriage contract from all obligations to each other save those of affection and loyalty, then it would be pertinent to inquire upon what theory the husband can be permitted to prosecute a suit like the one now in hand. It certainly cannot be maintained that the husband is entitled to sue for damages consequent upon the loss of his wife's services and society, unless she is still under an obligation to the husband, as at common law, to care for his home, attend to the wants of his family, and do whatever else is within her power which is conducive to his comfort, happiness, and prosperity.

That a married woman is still under an obligation to discharge these duties notwithstanding the existence of a statute such as prevails in Iowa, and that a husband is still entitled, as at common law, to recover damages for the loss of her society and services, was recently decided by this court in *St. Louis Southwestern Railway Company* v. *Henson*, 19 U. S. App. 169, 172. . . .

. . . . . .

It would seem, therefore, that the relations existing between husband and wife, and the responsibility of the former for the conduct and acts of the latter, remain as they were at common law, except in so far as they have been changed by express statutory enactment or by necessary legal intendment. It seems manifest from the phraseology of the Iowa statute above quoted that the purpose of the legislature in enacting that section was to exempt the husband from liability in suits brought against him by third parties for the torts of the wife, when they were committed by the wife of her own volition, without the aid, advice, or sanction of her husband. We can discover nothing in the language of the statute which gives it any greater scope, or which fairly indicates that the legislature intended to deprive a third party of the benefit of contributory negligence when he is sued by the husband for an injury sustained by the wife in consequence of her own and such third party's negligence. We are furthermore of opinion that such a construction of the statute would give it an effect which was not within the intent of the lawmaker. If a husband is still entitled under the laws of Iowa, as we have no doubt that he is, to maintain a common-law action for the loss of his wife's services and society, we know of no sufficient reason why he should not be chargeable in such an action with the wife's contributory fault. Entertaining these views, the judgment of the Circuit Court is

Reversed and the case is remanded, with directions to award a new trial.

SECTION VIII.

Whether Action under Death Statute is barred by Contributory Negligence of Sole Beneficiary.[1]

CONSOLIDATED TRACTION COMPANY *v.* HONE.

1896. 59 *New Jersey Law*, 275.

BEASLEY, C. J. This is a suit brought by Henry Hone as the administrator of the estate of his deceased son, who was a minor and was killed by the carelessness of the servants of the plaintiff in error, the Consolidated Traction Company, in the management of one of their cars.

The statute lying at the basis of the suit provides "that whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or the corporation which would have been liable if death had not ensued, shall be liable to an action of damages notwithstanding the death of the person injured," etc. Gen. Stat., p. 1188, § 10.

The following section directs "that the action shall be brought by and in the name of the personal representatives of the deceased person, and that the amount recovered shall be for the exclusive benefit

[1] At common law, no civil action could be maintained for wrongfully causing the death of a human being. Statutes have now been enacted in England and, generally, in the United States, giving an action for the benefit of specified relatives of a deceased person against one who tortiously caused his death. In Tiffany on Death by Wrongful Act, published in 1893, these statutes are printed in full in the appendix. The book also contains an analytical table of the statutes.

Sometimes the relatives are authorized to sue in person; while in other statutes it is provided that the action shall be brought by an administrator of the estate of the deceased. But, even under the latter class of statutes, the sum recovered does not usually become a part of the general assets of the estate available for the payment of creditors (unless, perhaps, in the absence of any relatives). In some instances the statute provides that an action can be brought only in case the person killed could have maintained an action if death had not ensued. But, even where the statute does not contain an explicit provision of the above nature, the courts generally hold that contributory negligence on the part of the deceased bars the statutory action. The question remains, which is discussed in the next case, viz.. Will the contributory negligence of the sole beneficiary bar the action, either where he is personally plaintiff, or where he is plaintiff in his capacity as administrator of the deceased, or where the plaintiff is a third person suing in the capacity of administrator?

The statutes of a few states may, perhaps, be construed as proceeding upon the theory that a right of action is vested in the deceased, and that provision is now made for the survival of such right of action. — ED.

of the widow and next of kin of such deceased person; and that in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person," etc. Id., § 11.

From these extracts from the statute it will be at once perceived that in this suit founded upon it, as in all others of the same class, but two questions are raised, and but two can be raised upon the record, viz., first, could the deceased, if he had survived, have maintained an action? and second, this being so, what pecuniary loss has fallen on his next of kin by reason of his death?

These are the facts constituting the issue to be tried, and no subject for trial can be more clearly defined.

Notwithstanding this it is contended in this case by the counsel of this traction company that they have the right to defeat the action if they can show that the death in question was the result in part of the negligent conduct of the next of kin, although such negligent conduct is not to be imputed to the infant who is deceased. The plaintiff in the present case is not only the personal representative, but is likewise the next of kin, and it is insisted that as the damages that may be recovered will enure exclusively to his benefit, he should in justice not be allowed to recover them if he was in part the cause of their production.

But it is to be remembered that the legal doctrine that bars a party injured by the unintentional misconduct of another by reason of his having himself been, in a measure, the occasion of the resulting damage, is rather an artificial rule of the law than a principle of justice, for its effect generally is to cast the entire loss ensuing from the joint fault upon one of the culpable parties, and oftentimes upon him who is but little to blame. Such a legal regulation has no claim to extension, and to apply it as is now insisted on would be to use it in a novel way. The question whether the deceased was negligent is within the issue formed by the pleading; while the question whether a third person who in his individual capacity has no connection with the suit was negligent has nothing whatever to do with such issue. In the legal practice of this state it is the established course to exclude everything that is not embraced in the issue as the parties have framed it and as it appears upon the record. On the trial of this case the inquiry whether the father of the deceased minor had, by his want of care, been instrumental in the production of the accident, was a matter utterly irrelevant to the subject then submitted to judicial inquiry.

The statute of Iowa, relating to this subject, and our own are similar, and in Wymor's case (78 Iowa, 396) the court of that state expressed very distinctly what is deemed the correct view of this topic, in these words: "If," says the opinion, "his parents, by their negligence, contributed to his death, that does not seem to be a sufficient reason for denying his estate relief. Such negligence would prevent a

recovery by the parents in their own right. . . . It is claimed that, . . . since they inherited his estate, the rule would bar a negligent parent from recovering in such case in his own right ought to apply. But the plaintiff seeks to recover in right of the child and not of the parents. It may be that a recovery in this case will result in conferring an undeserved benefit upon the father, but that is a matter which we cannot investigate. If the facts are such that the child could have recovered had his injuries not been fatal, his administrator can recover the full amount of damages which the estate of the child sustained."

The subject will be found illustrated by a reference to many cases in 4 Am. & Eng. Encycl. L. 88.

My conclusion is that there is no fault to be found with the trial of this case in reference to this point.

[After overruling another objection.]

Judgment affirmed.

[By writ of error to review the above judgment of the Supreme Court, the case was brought before the Court of Errors and Appeals. That court was equally divided upon the question whether contributory negligence on the part of the sole next of kin would defeat the action. No opinions on that question are reported. *Consolidated Traction Co.* v. *Hone*, 60 New Jersey Law, 444.] [1]

[1] In *Warren* v. *Street R.*, 70 New Hampshire, 352, p. 362, PIKE, J., said: "The child's cause of action survived by reason of the statute, and the money recovered in it will be assets in the hands of its administrator, to be distributed in accordance with the special provisions of the statute. If the father's negligence barred his right to recover in this action, there would seem to be no reason why it would not bar him from recovering any property of the child which he might inherit under the general provisions relating to descent and distribution; but this is not claimed to be and is not the law."

The material provisions of the Iowa statutes under consideration in *Wymore* v. *Mahaska County*, 78 Iowa, 396, referred to by BEASLEY, C. J., *supra*, are as follows: —

Section 3730, McClain's Annotated Code of Iowa. All causes of action shall survive, and may be brought, notwithstanding the death of the person entitled or liable to the same.

Section 3731. . . . When a wrongful act produces death, the damages shall be disposed of as personal property belonging to the estate of the deceased, except that if the deceased leaves a husband, wife, child, or parent, it shall not be liable for the payment of debts.

Section 3732. The actions contemplated in the two preceding sections may be brought, or the court, on motion, may allow the action to be continued, by or against the legal representatives or successors in interest of the deceased. Such action shall be deemed a continuing one, and to have accrued to such representative or successor at the same time it did to the deceased if he had survived. . . .

Section 3761. A father, or, in case of his death or imprisonment or desertion of his family, the mother, may prosecute as plaintiff an action for the expenses and actual loss of service resulting from the injury or death of a minor child. — ED.

RICHMOND, FREDERICKSBURG & POTOMAC R. R. CO. *v.* MARTIN'S ADM'R.

1903. 102 *Virginia*, 201.[1]

WHITTLE, J. . . . This action was brought by the defendant in error, Patrick Martin, administrator of Alice Martin, deceased, against the plaintiff in error, the Richmond, Fredericksburg & Potomac Railroad Company, to recover damages for the negligent killing of his intestate, a daughter seven years of age, by a passenger train of the defendant company at a public crossing. The mother of the child was killed in the same collision, and the action was instituted for the sole benefit of the father, who, under the statute, is entitled to the recovery. At the trial there was a verdict for the plaintiff, upon which the judgment under review was rendered.

The defendant adduced evidence tending to prove that Patrick Martin, Jr., a minor eleven years old, and a son of the plaintiff, was put in charge of a two-horse Dayton wagon, as driver by his father, in which his mother and two younger sisters and a negro boy were to be driven from their home in the country to the city of Fredericksburg; that Patrick Martin, Jr., negligently drove upon and attempted to cross the railway track at Falmouth crossing, in plain view of a rapidly approaching train; and that in the collision which followed his mother and two sisters, who occupied a rear seat in the vehicle, were instantly killed. Thereupon the defendant moved the court to instruct the jury that if they believed from the evidence that Patrick Martin, Jr., the son and servant of the plaintiff, attempted to cross the track under the circumstances detailed, his conduct constituted such contributory negligence as to bar a recovery. The court refused to give the instruction, which ruling presents for decision the sole question in the case, namely, whether a father, whose negligence has contributed to the death of his minor child, can, under the statute, in an action instituted by him as administrator, suing for his own benefit, recover damages for the death of the child. The statute requires such actions to be brought by and in the name of the personal representative of the deceased person, and empowers the jury to award such damages as to it may seem fair and just, not exceeding ten thousand dollars.

The primary object of the statute in allowing an action to recover damages for death by wrongful act of another, like its prototype, Lord Campbell's act, was to compensate the family of the deceased, and was not in the interest of the general estate, the provision being that: "The amount recovered in any such action shall, after the payment of costs and reasonable attorneys' fees, be paid to the wife, husband, parent, and child of the deceased, in such proportion as the jury may

[1] Portions of opinion omitted. — ED.

have directed, or, if they have not directed, according to the statute of distributions, and shall be free from all debts and liabilities of the deceased; but if there be no wife, husband, parent, or child, the amount so received shall be assets in the hands of the personal representative, to be disposed of according to law." Code 1887, secs. 2903, 2905.

It will be observed that by the express language of the statute the damages awarded cannot become assets in the hands of the administrator, to be disposed of according to law, if the decedent is survived by a wife, husband, parent, or child; and the recovery is also made free from all debts of the decedent, thus leaving no doubt of the legislative intent to treat the recovery as wholly independent of the decedent and his estate in the event of the survival of any one of the enumerated kin, and making it enure directly and personally to such next of kin by force of the statute, and not derivatively from the decedent, to whom it never belonged either in fact or in contemplation of law.

The authorities all agree that there can be no recovery where the action is brought in the name and for the benefit of one whose negligence has contributed to the accident. Thus, if the child in this instance had been injured, instead of killed, and the father had brought a common-law action to recover damages for the injury, contributory negligence on his part, if established, would have constituted a bar to the action. But the contributory negligence of the father would interpose no defence to an action by the child for such injury. The rule is that the child's want of responsibility for negligence can no more be invoked to maintain the action of the negligent father than can the negligence of the latter be imputed to the child to defeat an action by him.

In this case both parties, at the time of the accident, were represented by agents — the defendant company by its employees, and the plaintiff, by his son, to whose care he had confided the custody of the younger sister — and both were responsible for the acts and omissions of their respective agents. *Glassey* v. *Ry. Co.*, 57 Pa. 172.

In *Bellefontaine Ry. Co.* v. *Snyder*, 24 Ohio St. 670, the court said: "Where an infant intrusted to the care and custody of another by the father, is injured through the negligence of a railroad company, the custodian of the child also being guilty of negligence which contributed to the result, although the infant may maintain an action for such injury, the father cannot; the negligence of his agent, the custodian of the child, being in law 'the negligence of the father.'

"When an action for negligent injury of an infant is brought by the parent, or for the parent's own benefit, it is very justly held that the contributory negligence of such parent may be shown in bar of the action, the negligence of his agent to whom he had intrusted the child having contributed to cause the injury; and such negligence, being, in contemplation of law, the parent's negligence, was held to bar the action." Beach on Con. Neg. sec. 131.

The doctrine of imputed negligence has no application to the case, but the rule that the negligent father cannot recover is founded upon the fundamental principle that no one can acquire a right of action by his own negligence. The principle involves a maxim of the law as old as the common law itself. The difference between an action by the father for injuries to the child where death does not ensue and an action by the father as administrator of his dead child, brought under the statute for his own benefit, is a difference in form merely, not in substance, and on principle there can be no more reason for permitting a recovery in the latter case than in the former. In both the father is the substantial plaintiff and the sole beneficiary. To allow a recovery in either would be a violation of the policy of the law, which forbids that one shall reap a benefit from his own misconduct. Accordingly the authorities are practically unanimous to the effect that the guiding principle in both classes of cases is identical, and the contributory negligence of the beneficial plaintiff will as effectually defeat a recovery in the one case as in the other.

In Kinkead's Com. on Torts, sec. 474, the author says the rule is well settled that the negligence of a parent of a minor is a bar to an action by him to recover damages for an injury to the minor, and adds: "It may, however, be contended with equal force that the fact that a parent is a beneficiary in case of death, that contributory negligence on his part should be a defence to an action brought under the statutes now being considered, as well as in an action in his own name for a personal injury. The policy of the law is not to allow a recovery for the benefit of a wrongdoer, and this should be applied as well to actions in the name of another for the benefit of those who may have contributed to the wrong. What shall constitute a defence to this class of actions is not prescribed in these statutes, but is governed by the same principles applicable to personal injuries. It is considered by the majority of cases that the administrator is only a trustee or a mere nominal party, and that the action will be defeated by the contributory negligence of the beneficiaries." [Remainder of opinion omitted.]

Judgment reversed. Case remanded for a new trial.[1]

[1] "The right of recovery and measure of damages are different from what existed in the intestate. This right of recovery did not exist at common law. It is wholly given by the act. It is not an act to cause to survive a right of recovery which otherwise would be taken away by the death of the injured. . . . Hence the contention that the recovery is in the right of the intestate, and can be defeated only by his contributory negligence, cannot be sustained. . . . From a very early day the common law has denied a recovery, as unjust, to a party whose negligence has contributed to the accident causing the injury for which he demands damages. All statutes conferring a right of recovery of damages, especially when in terms they give such damages only as are *just*, must be read and considered with reference to this universal principle of the common law." Ross, C. J., in *Ploof* v. *Burlington Traction Company*, 70 Vermont, 509, pp. 516, 517.

"Shall the state say to the father, 'If you know that your child is in danger of injury from the negligence of others, you are under no legal obligation to protect it from such injury, and if you allow the child to be killed, you may recover, from one who is equally at fault with yourself, for any pecuniary injury you may suffer by reason of the death'? No such meaning can be derived from the statute." SEDGWICK Com. in *Tucker* v. *Draper*, 62 Nebraska, 66, p. 76. — ED.

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CHAPTER IX.

DUTY OF CARE ON THE PART OF OCCUPIER OF LAND OR BUILDINGS.

SECTION I.

Duty of Care towards Persons using Adjacent Public Way.

BARNES v. WARD.

1850. 9 *Common Bench* (*Manning, Granger, and Scott*), 392.[1]

MAULE, J., delivered the judgment of the Court.

This was an action on the case founded on the statute 9 & 10 Vict. c. 93, "An act for compensating the families of persons killed by accident," and brought by the administrator of Jane Barnes.

The declaration (as amended during the trial) alleged that the defendant before and at the time when, &c., was possessed of a messuage, with the appurtenances, near to a common and public foot-way in front and before which said messuage, and parcel of the appurtenances thereof, and close to and by the side of the said foot-way, and abutting upon and opening into the same, there then was a large hole, vault, pit, or area, which hole, &c., the defendant, by reason of the possession of the said messuage, with the appurtenances, before and at the said time when, &c., ought to have so sufficiently guarded, fenced off, and railed in, as to prevent damage or injury to any person or persons lawfully passing in or along the said foot-way; yet that the defendant, while he was so possessed of the said messuage, and the said hole, &c., and premises, with the appurtenances, and whilst there was such hole, &c., on &c., wrongfully, and contrary to his duty in that behalf, permitted and suffered the said hole, &c., to be and continue, and the same was then so wholly unguarded and not fenced off or railed in, that, by means of the premises, and for want of proper and sufficient guarding, fencing off, and railing in of the same, the said Jane Barnes, who was lawfully passing in and upon the said foot-way, slipped and fell into the said hole, &c., and was thereby killed.

The defendant pleaded, — first, not guilty; secondly, that he was not possessed of the said messuage, with the appurtenances, in manner and form, &c.; thirdly, that he ought not, by reason of his possession of

[1] Statement of facts by reporter omitted; also arguments of counsel. — ED.

the said messuage, &c., with the appurtenances, to have guarded, fenced off, and railed in the said hole, &c., in manner and form, &c.; on which pleas issues were respectively joined.

At the trial, before Coltman, J., at the sittings in Middlesex, after Easter term, 1847, it appeared that Jane Barnes was passing, between eight and nine o'clock at night, on the 26th of October, 1849 [?], along a road which had on the one side of it a dead wall, and on the other a row of houses, some of which were finished and some unfinished. It being dark, and no light near, she accidentally fell from a path which was on the road by the side of the houses, into the open area of one of the unfinished ones, which was shown to have been at that time in the possession of the defendant, and was killed by the fall. The area was separated from the path by a curbstone which was intended for the reception of upright iron rails.

On the part of the defendant, it was contended: first, that there was no sufficient evidence that the footpath was a public way; secondly, that a man has a right to make a hole in his own ground, and is not bound to fence an adjoining highway against such a hole; thirdly, that the third issue was not sustained, in its terms, by the evidence.

The learned judge told the jury that, if there was a public way abutting on the area, and it would be dangerous to persons passing, unless fenced, or a public way so near that it would produce danger to the public, unless fenced, the defendant would be liable, unless the accident was occasioned by want of ordinary caution on the part of the deceased.

The jury found that there was an immemorial public way abutting on the area, and gave a verdict for the plaintiff, with 300*l.* damages.

The learned judge having given leave to the counsel for the defendant to move the Court, on the points suggested by him, a rule was obtained accordingly, to show cause why a nonsuit should not be entered; and, further, why the judgment should not be arrested, on the ground that the declaration disclosed no good cause of action.

On the argument of this rule, before my brothers Coltman and Williams, and myself, it was contended, on behalf of the defendant: first, that the evidence on the part of the plaintiff furnished no case for the consideration of the jury, as to the existence of an immemorial public foot-way; secondly, that the obligation of the defendant to fence off the area, was not properly described in the declaration; thirdly, that no such obligation existed as that alleged; for, that the owner of land is not bound to fence off an excavation in it by the side of a public road.

As to the first point, the Court was clearly of opinion that there was sufficient evidence to go to the jury, as to the existence of a public foot-way from time immemorial.

As to the second point, the objection was, that the liability of the defendant was alleged to exist in respect of the house and the appurtenances; whereas, on the evidence, it appeared to exist, if at all, by

reason of the possession of the appurtenances alone, *i. e.* of the area. But the Court was of opinion that the declaration might be regarded as truly describing the origin of the liability of the defendant, viz., that he was in the possession of a house, to which an area appertained, abutting on a public foot-way.

On the third point, however, the Court felt so much doubt and difficulty, that a second argument was directed, which took place in Easter term last, before Wilde, C. J., Coltman, J., Cresswell, J., and V. Williams, J.

The arguments for the plaintiff were, that, when a public way has existed from time immemorial, the public have a right to enjoy it with ease and security; and that, if a man prevents that enjoyment, even by the use of his own property, he is responsible as for a public nuisance. And the case was put, of the proprietor of land over which a public way passes, excavating his land on each side thereof, so as to leave the line of way running between two precipices; which, it was argued, would, in effect, make the way impassable, and therefore be a public nuisance. And the cases of *Coupland* v. *Hardingham*, 3 Campb. 398, and *Jarvis* v. *Dean*, 3 Bingh. 447 (E. C. L. R., vol. 11), 11 J. B. Moore, 354 (E. C. L. R., vol. 22), were cited.

Coupland v. *Hardingham* was an action on the case for negligence, in not railing in or guarding an area before a house in Westminster, whereby the plaintiff fell down into the area, and was severely hurt. The defence was, that the premises had been in the same condition as far back as could be remembered, and before the defendant became possessed of them. But Lord Ellenborough held, that, however long the premises might have been in this condition, as soon as the defendant took possession of them he was bound to guard against the danger to which the public had before been exposed; and that he was liable for the consequences of having neglected so to do, in the same manner as if he himself had originated the nuisance: and the learned judge said that the area belonged to the house, and it was a duty which the law cast upon the occupier of the house to render it secure.

Jarvis v. *Dean* was also an action on the case to recover damages for an injury occasioned to the plaintiff by his falling at night into an area, which the declaration alleged the defendant wrongfully and negligently to have left open at a house he possessed, in the parish of Islington, and in, near, and adjoining a certain street there, which was a common highway. The only point of law decided in the cause was, as to whether the evidence sufficiently proved a dedication of the road to the public. And the case is only an authority on the present subject, to this extent, viz., that it appears to have been assumed as a matter beyond dispute, that the action was well founded, supposing the road was shown to have been a public one.

On the part of the defendant, it was argued, that no use which a man chooses to make of his own property can amount to a nuisance to a public or private right, unless it in some way interferes with the lawful

enjoyment of that right; that, in the present case, the excavation of the area in no manner interfered with the way itself, or was in any sense hurtful or perilous to those who confined themselves to the lawful enjoyment of the right of way; and that it was only to those who, like the deceased, committed a trespass, by deviating on to the adjoining land, that the existence of the area, though not fenced, could be in any degree detrimental or dangerous.

In support of this view of the subject, reliance was placed on the case of *Blythe* v. *Topham*, 1 Roll. Abr. 88, Cro. Jac. 158, *supra*, 421 (*b*), where it was held that, if A., seised of a waste adjacent to a highway, digs a pit in the waste, within thirty-six feet of the highway, and the mare of B. escapes into the waste, and falls into the pit, and dies there; yet B. shall not have an action against A., because the making of the pit in the waste, and not in the highway, was not any wrong to B.; but it was the default of B. himself that his mare escaped into the waste. And, in further support of this doctrine, a passage was cited from the judgment of Alderson, B., in *Jordin* v. *Crump*, 8 M. & W. 782, where the case is put of a man who, passing in the dark along a foot-path, should happen to fall into a pit dug in the adjoining field, by the owner of it. "In such a case," says the learned judge (p. 788), "the party digging the pit would be responsible for the injury if the pit were dug across the road; but, if it were only in an adjacent field, the case would be very different, for the falling into it would be the act of the injured party himself." And, as to the case of *Coupland* v. *Hardingham*, it was not only denied to be law, by the counsel for the defendant, but it was further argued that, in that case, — as appeared by the original *nisi prius* record, procured by COLTMAN, J., — as also in *Jarvis* v. *Dean*, — the area was in one count alleged to be in the highway.

But it seems clear to us that, in each of these cases, the area in question was not parcel of the road, but was an area meant to be fenced off from it, in the ordinary way, by upright iron rails, so as to exclude the public from it, in a manner quite inconsistent with the notion of its being itself a part of the highway. And, with respect to the case of *Blythe* v. *Topham*, and the passage cited from the judgment in *Jordin* v. *Crump*, it must be observed that, in these instances, the existence of the pit in the waste or field adjoining the road is not said to have been dangerous to the persons or cattle of those who passed along the road, if ordinary caution were employed.

In the present case, the jury expressly found the way to have existed immemorially; and they must be taken to have found that the state of the area made the way dangerous for those passing along it, and that the deceased was using ordinary caution in the exercise of the right of way, at the time the accident happened.

The result is, — considering that the present case refers to a newly made excavation adjoining an immemorial public way, which rendered the way unsafe to those who used it with ordinary care, — it appears to us, after much consideration, that the defendant, in having made that

excavation, was guiity of a public nuisance, even though the danger consisted in the risk of accidentally deviating from the road; for the danger thus created may reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public is, in effect, as much impeded as in the case of an ordinary nuisance to a highway.

With regard to the objection, that the deceased was a trespasser on the defendant's land at the time the injury was sustained, — it by no means follows from this circumstance that the action cannot be maintained. (A trespasser is liable to an action for the injury which he does; but he does not forfeit his right of action for an injury sustained.) Thus, in the case of *Bird* v. *Holbrook*, 4 Bingh. 628 (E. C. L. R., vol. 13, 15), 1 M. & P. 607 (E. C. L. R., vol. 17), the plaintiff was a trespasser, — and indeed a voluntary one, — but he was held entitled to an action for an injury sustained in consequence of the wrongful act of the defendant, without any want of ordinary caution on the part of the plaintiff, although the injury would not have occurred if the plaintiff had not trespassed on the defendant's land. This decision was approved of in *Lynch* v. *Nurdin*, 1 Q. B. 37, 4 P. & D. 677, and also in the case of *Jordin* v. *Crump*, in which the Court, though expressing a doubt as to whether the act of the defendant in setting a spring-gun was illegal, agreed that, if it were, the fact of the plaintiff's being a trespasser would be no answer to the action.

For these reasons, we are of opinion that the declaration in this case discloses a good cause of action; and also that the third issue was properly found for the plaintiff.

The rule, therefore, must be discharged.

Rule discharged.

SECTION II.

Duty of Care towards Trespasser.

LARY *v.* CLEVELAND, &c. RAILROAD COMPANY.

1881. 78 *Indiana*, 323.[1]

Lary sued the railroad company for damage alleged to have been sustained by him, through the negligent failure of the company to repair a building standing on its grounds, and formerly used by it as a freight house. Answer, a general denial. Upon the trial, the plaintiff introduced his evidence; the defendant demurred to it, and the plaintiff joined in demurrer. The Court sustained the demurrer, and the plaintiff excepted.

The facts which the plaintiff's evidence tended to prove are substantially as follows: —

The railroad company owned half an acre of land between the railroad track and a highway. On this land was a building erected several years before for a freight house. It was no longer used as the general freight house, though still used for storing the company's wood. A part of the roof of the building was off, and had been so for some months. The plaintiff, who was twenty years of age, was in the habit of passing the building almost daily, and had noticed that part of the roof was off. (In a rain storm, the plaintiff went under the platform of the old freight house, and played there with other young people. A piece of the roof was torn off by the wind. The plaintiff, being frightened at the noise, ran out, saw the piece of the roof in the air, and ran towards the highway; but before or as he reached the edge of it, this fragment of the roof fell upon him.)

W. A. Kittinger, *A. F. Harrison* and *W. R. Pierse*, for appellant.

A. C. Harris, *H. H. Poppleton*, *J. A. Harrison*, and *R. Lake*, for appellee.

Morris, C. [After fully stating the case.] Upon the facts thus stated, can the appellant maintain this action?

There is no testimony tending to show that the appellant was at the freight house by the invitation of the appellee, nor that he was there for the purpose of transacting any business with the appellee. The appellant intruded upon the premises of the appellee, and is not, therefore, entitled to that protection which one, expressly or by implication, invited into the house or place of business of another, is entitled to. The

[1] Statement abridged. — Ed.

appellant was a trespasser, and as such he entered upon the appellee's premises, taking the risks of all the mere omissions of the appellee as to the condition of the grounds and buildings thus invaded without leave. We do not wish to be understood as holding or implying that if, on the part of the appellee, there had been any act done implying a willingness to inflict the injury upon the appellant, it would not be liable. But we think there is nothing in the evidence from which such an inference can be reasonably drawn. The building could be seen by all; its condition was open to the inspection of every one; it had been abandoned as a place for the transaction of public business; it was in a state of palpable and visible decay, and no one was authorized, impliedly or otherwise, to go into or under it. (Under such circumstances, the law says to him who intrudes into such a place, that he must proceed at his own risk.)

In the case of *The Pittsburgh, &c. R. W. Co.* v. *Bingham*, 29 Ohio St. 364, the question was: "Is a railroad company bound to exercise ordinary care and skill in the erection, structure, or maintenance of its station house or houses, as to persons who enter or are at the same, not on any business with the company or its agents, nor on any business connected with the operation of its road; but are there without objection by the company, and therefore by its mere sufferance or permission?" The Court answered this question in the negative.

In the case of *Hounsell* v. *Smyth*, 7 C. B. N. S. 731, the plaintiff fell into a quarry, left open and unguarded on the unenclosed lands of the defendant, over which the public were permitted to travel; it was held that the owner was under no legal obligation to fence or guard the excavation unless it was so near the public road as to render travel thereon dangerous. That the person so travelling over such waste lands must take the permission with its concomitant conditions, and, it may be, perils. *Hardcastle* v. *The South Yorkshire R. W. Co.*, 4 H. & N. 67; *Sweeny* v. *Old Colony, &c. R. R. Co.*, 10 Allen, 368; *Knight* v. *Abert*, 6 Barr, 472.

After reviewing the above and other cases, Judge Boynton, in the case of the *Pittsburgh, &c. R. W. Co.* v. *Bingham*, *supra*, says: —

"The principle underlying the cases above cited recognizes the right of the owner of real property to the exclusive use and enjoyment of the same without liability to others for injuries occasioned by its unsafe condition, where the person receiving the injury was not in or near the place of danger by lawful right; and where such owner assumed no responsibility for his safety by inviting him there, without giving him notice of the existence or imminence of the peril to be avoided."

In the case from which we have quoted, the intestate of the plaintiff was at the defendant's station house, not on any business with it, but merely to pass away his time, when, by a severe and sudden blast of wind, a portion of the roof of the station house was blown off the building and against the intestate, with such force as to kill him. The case, in its circumstances, was not unlike the one before us. *Nicholson* v. *Erie R. W. Co.*, 41 N. Y. 525; *Murray* v. *McLean*, 57 Ill. 378; *Durham* v. *Musselman*, 2 Blackf. 96 (18 Am. Dec. 133).

In the case of *Sweeny* v. *Old Colony, &c. R. R. Co.*, 10 Allen, 368, the Court say: —

"A licensee, who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils." *Carleton* v. *Franconia Iron and Steel Co.*, 99 Mass. 216; *Harris* v. *Stevens*, 31 Vt. 79, 90; *Wood* v. *Leadbitter*, 13 M. & W. 838.

The evidence in this case brings it, we think, within the principles settled by the above cases.

The appellant contends that the evidence shows that the appellee was guilty of gross negligence in not repairing its freight house, and that such negligence renders it liable, though he entered upon its premises without invitation or license, as a mere intruder, and was, while such intruder, injured; and, in support of this proposition, we are referred to the following cases: *Lafayette, &c. R. R. Co.* v. *Adams*, 26 Ind. 76; *Indianapolis, &c. R. R. Co.* v. *McClure*, 26 Ind. 370; *Gray* v. *Harris*, 107 Mass. 492; *Isabel* v. *Hannibal, &c. R. R. Co.*, 60 Mo. 475.

In the first of the above cases, the Court held that, where the negligence of the company was so gross as to imply a disregard of consequences or a willingness to inflict the injury, it was liable, though the party injured was not free from fault. In the second case, it was held that a railroad company, not required to fence its road, would not be liable for animals killed on its road, unless guilty of gross negligence. The phrase "gross negligence," as used in these cases, means something more than the mere omission of duty; it meant, as shown by the evidence in the cases, reckless and aggressive conduct on the part of the company's servants. "Something more than negligence, however gross, must be shown, to enable a party to recover for an injury, when he has been guilty of contributory negligence." *The Pennsylvania Co.* v. *Sinclair*, 62 Ind. 301. There was, in the cases referred to in 26 Ind., something more than negligence. As in the case of *The Indianapolis, &c. R. W. Co.* v. *McBrown*, 46 Ind. 229, where the animal was driven through a deep cut, eighty rods long, into and upon a trestle work of the company, there was aggressive malfeasance. In the Massachusetts case, the Court held that a party building a dam across a stream must provide against unusual floods. We do not think these cases applicable to the one before us.

There could be no negligence on the part of the appellee, of which the appellant can be heard to complain, unless at the time he received the injury, the appellee was under some obligation or duty to him to repair its freight house. "Actionable negligence exists only where the one whose act causes or occasions the injury owes to the injured person a duty, created either by contract or by operation of law, which he has failed to discharge." *Pittsburgh, &c. R. W. Co.* v. *Bingham, supra;*

Burdeck v. *Cheadle*, 26 Ohio St. 393; *Town of Salem* v. *Goller*, 76 Ind. 291. We have shown that the appellee owed the appellant no such duty.

The judgment below should be affirmed.

PER CURIAM. It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

HERRICK *v.* WIXOM.

1899. 121 *Michigan*, 384.[1]

TRESPASS ON THE CASE for personal injuries.

Defendant was the possessor and manager of a tent show or circus. On the afternoon of an exhibition plaintiff went inside the tent and took a seat. (There was a conflict of testimony as to whether plaintiff was invited into the tent by an authorized agent of defendant, or whether he entered without any invitation or other justification.) A feature of the entertainment consisted in the ignition and explosion of a giant firecracker, attached to a pipe set in an upright position in one of the show rings. Plaintiff sat thirty or forty feet from the place where the cracker was exploded. At the explosion, (part of the firecracker flew and struck plaintiff in the eye, whereby he lost the sight of his eye.)

The judge left to the jury the question whether it was negligent in defendant to explode this firecracker in the inside of the tent and in the presence of the audience.

Then he gave, among others, the following instruction: —

"Now you must further find, in order that the plaintiff recover, that the plaintiff was in the tent, where he was injured, by the invitation of some person having authority to allow him to go in there. If he was a mere trespasser, who forced his way in, then the defendant owed him no duty that would enable him to recover under the declaration and proofs in this case.").

Verdict of no cause of action. Judgment for defendant. Plaintiff brought error.

Dean & Hooker (*John T. McCurdy*, of counsel), for appellant.

Watson & Chapman, for appellee.

MONTGOMERY, J. [After stating the case.] We think this instruction faulty, in so far as it was intended to preclude recovery in any event if the plaintiff was found to be a trespasser. It is true that a trespasser who suffers an injury because of a dangerous condition of premises is without remedy. But, (where a trespasser is discovered upon the premises by the owner or occupant, he is not beyond the pale of the law, and any negligence resulting in injury will render the

[1] Statement abridged. Part of opinion omitted. — ED.

person guilty of negligence liable to respond in damages. Beach, Contrib. Neg. § 50; Whart. Neg. § 346; *Marble* v. *Ross*, 124 Mass. 44; *Houston, etc., R. Co.* v. *Sympkins*, 54 Tex. 615 (38 Am. Rep. 632); *Brown* v. *Lynn*, 31 Pa. St. 510 (72 Am. Dec. 768); *Needham* v. *Railroad Co.*, 37 Cal. 409; *Davies* v. *Mann*, 10 Mees. & W. 546; 1 Shear. & R. Neg. § 99. In this case the negligent act of the defendant's servant was committed after the audience was made up. The presence of plaintiff was known, and the danger to him from a negligent act was also known. (The question of whether a dangerous experiment should be attempted in his presence, or whether an experiment should be conducted with due care and regard to his safety, cannot be made to depend upon whether he had forced himself into the tent. Every instinct of humanity revolts at such a suggestion.)

For this error the judgment will be reversed, and a new trial ordered.

MAYNARD *v.* BOSTON AND MAINE RAILROAD.

1874. 115 *Massachusetts*, 458.[1]

TORT for the killing of a horse on a railroad by a locomotive engine.

Upon the trial, the plaintiff admitted that the horse must be considered as trespassing upon the railroad, but contended and offered evidence tending to show that by an exercise of proper care the injury to the horse might have been avoided. The defendants offered evidence to control this, and tending to show that they did all they reasonably could do to stop their train before striking the horse. There was no evidence of any wanton misconduct on their part.

The counsel for the defendants contended and asked the presiding judge to rule, that the defendants would not be liable, unless the plaintiff proved a reckless and wanton misconduct of their employees in the management of the train when the horse was killed. The presiding judge declined so to rule; but did rule that though the horse was trespassing upon the defendants' land at the time, the managers of the train could not carelessly run over him, but were bound to use reasonable care to avoid injuring him, and that if the jury found that by the exercise of reasonable care they might have avoided injuring the horse, they would be liable. The jury found for the plaintiff, and the defendants alleged exceptions.

C. P. Judd and *C. F. Choate*, for defendants.

S. J. Thomas, for plaintiff.

GRAY, C. J. If the horse had been rightfully upon the defendants' land, it would have been their duty to exercise reasonable care to avoid injuring the horse. But it being admitted by the plaintiff that his horse was trespassing upon the railroad, they did not owe him that duty, and

[1] Statement abridged. Argument omitted. — ED.

were not liable to him for anything short of a reckless and wanton misconduct of those employed in the management of their train. The defendants were therefore entitled to the instruction which they requested. *Tonawanda Railroad* v. *Munger*, 5 Denio, 255; s. c. 4 Comst. 349; *Vandegrift* v. *Rediker*, 2 Zab. 185; *Railroad Co.* v. *Skinner*, 19 Penn. St. 298; *Tower* v. *Providence & Worcester Railroad*, 2 R. I. 404; *Cincinnati, Hamilton & Dayton Railroad* v. *Waterson*, 4 Ohio St. 424; *Louisville & Frankfort Railroad* v. *Ballard*, 2 Met. (Ky.) 177.

The instruction given to the jury held the defendants to the same obligation to the plaintiff as if his horse had been rightfully on their land; and made their paramount duty to the public of running the train with proper speed and safety, and their use of the land set apart and fitted for the performance of that duty, subordinate to the care of private interests in property which was upon their track without right.

Some passages in the opinion in *Eames* v. *Salem & Lowell Railroad*, 98 Mass. 560, 563, were relied on by the plaintiff's counsel at the argument, and apparently formed the basis of the rulings of the learned judge in the Court below. But in that case there was no evidence of any negligence or misconduct in the management of the train, and an exact definition of the defendants' liability, by reason of such negligence or misconduct, was not required. In the present case such a definition was requested by the defendants in appropriate terms, and was refused, and for that refusal their

Exceptions must be sustained.

CINCINNATI, &c. RAILROAD COMPANY *v.* SMITH.

1871. 22 *Ohio State Reports*, 227.[1]

Error to the Court of Common Pleas of Fayette County, reserved in the District Court.

The plaintiff below, Richard Smith, sued the defendant below, the Cincinnati & Zanesville Railroad Company, to recover the value of two horses alleged to have been killed through the negligence of the servants of the defendant in operating one of its trains. The inclosure of the plaintiff adjoined the railroad of the defendant; and from this inclosure, on the night on which the horses were killed, they escaped on to the railroad.

The Court, among other things, charged the jury as follows: —

The defendant's servants in this case were not bound to use extraordinary care or extraordinary means to save the plaintiff's horses. But they were bound to use what, in that peculiar business, is ordinary

[1] Statement rewritten; part of case omitted; argument omitted. — Ed.

care and diligence; and if the loss of the horses was the result of a want of that ordinary care and diligence, the defendant is liable.

The defendant had the right to the free and unobstructed use of its railroad track. And the paramount duty of the employees is the protection of the passengers and property in the train, and the train itself.

But this being their paramount duty, they are bound to use ordinary care and diligence, so as not unnecessarily to injure the property of others.

Under the circumstances of the case, could and would reasonably prudent men, skilled in that kind of business, keeping in view as their paramount duty the protection and safety of the train, its passengers, and the property on and about it intrusted to their care, in the exercise of ordinary care have stopped the train and saved the horses? If so, and the defendant's servants did not so act, the defendant is liable in this case; otherwise the defendant is not liable.

In considering the paramount duty of the employees in the proper management of the train for the safety of passengers and property of its train, you have a right to determine whether they have other duties to perform. It is claimed the engineer had other duties than watching the track to perform, which were necessary for the safety of the passengers and property of the train, — such as gauging his steam, watching time-table, regulating his supply of water, examining his machinery, watching for the station-signal, etc. If such were the case, he had a lawful right to perform these duties, and was not bound to neglect them to save the plaintiff's horses, nor bound to watch the track while performing these duties. They were only bound, under the circumstances of the case, to use ordinary care and diligence to save the horses, — the safety of the passengers and property of the train being their paramount duty; and if the jury find from the evidence that the persons in charge of the engine were attending to the duties of the train approaching the station at the time of the accident, these duties were paramount to watching the track for trespassing animals; and if the horses were not, on that account, discovered in time to save them by using ordinary means to stop the train, the defendant is not liable.

It is claimed by the defendant's counsel that off the crossings of the railroad the servants of the railroad company have a right to presume that there are no trespassers on the roadway; that they are not bound to look out for trespassers except for the safety of passengers or property in charge. It is also claimed that inasmuch as the road at the place where the plaintiff's horses got on the track and were killed was fenced, on that account the defendant's servants in charge of the train were not bound to look out for trespassing stock. Upon this question I only can charge you this: That if the railroad was fenced at the place where the horses got on and were killed, and this was known to the defendant's employees, you have a right to look to that

circumstance as reflecting upon and in determining whether the employees exercised ordinary care in the management of the train. But if they might, in the exercise of ordinary care, have discovered the animals, although they were trespassers on the roadway, other than at a crossing, in time to have prevented their destruction, it was their duty to do so; and if from such want of ordinary care they were not discovered in time to prevent their destruction, the defendant is liable for their loss to the plaintiff.[1]

J. D. Wallace, for plaintiff in error.

R. A. Harrison, for defendant in error.

WHITE, J. The whole charge is set out in the bill of exceptions. Considering its several parts in connection, and giving to the whole a fair construction, we deem it necessary only to notice two particulars in which it is objected to.

These are: 1. Whether the fact that the horses were trespassing on the track excused the servants of the defendant from the exercise of ordinary care; and, 2. Whether that fact, and the additional one that the road was fenced, excused the engineer, as respects the owner of stray animals, from looking ahead to see whether such animals were on the track or not.

In regard to the first of these particulars, it is contended on behalf of the railroad company that, as the horses were trespassing on the railroad, the company was exempt from using ordinary care to save them, and that it was only liable for what is called gross negligence.

The Court instructed the jury that the defendant had the right to the free and unobstructed use of its railroad track, and that the paramount duty of its employees was the protection of the passengers and property in the train, and the train itself. But this being their paramount duty, they were bound to use ordinary care and diligence so as not unnecessarily to injure the property of others.

We think the charge stated the law correctly. We see no good reason, in principle, why a party, so far as may be consistent with the full enjoyment of his own rights, ought not to use ordinary care so as not unnecessarily to injure the property of others.

It is true, the rule contended for by the counsel of the plaintiff in error is sustained by a number of authorities. But the later and better considered cases are to the contrary. *Illinois Central R. R. Co.* v. *Middlesworth*, 46 Ill. 494; *Bemis* v. *Conn., &c. R. R.*, 42 Vt. 375; *Isbell* v. *N. Y. R. R. Co.*, 27 Conn. 393; Redfield's American Railway Cases, 355, 356.

The rule contended for has never been adopted in this State. It is, moreover, as respects railroad companies, inconsistent with our statute law on the subject. S. & C. 331.

The facts in the case of the *C. H. & D. R. R. Co.* v. *Waterson & Kirk*, 4 Ohio St. 424, cited and relied upon by the counsel of the plaintiff

[1] The above portions of the instructions are set out in the argument of counsel, pp. 235–237.

in error, were different from those in the case now before us, and we do not regard the rule there laid down as to the liability of the company in that case as applicable to this.

From what has been said of the charge in the first particular named, it would seem to follow that it is unobjectionable as respects the second. If it was the duty of the servants of the company, so far as was consistent with their other and paramount duties, to use ordinary care to avoid injuring animals on the track, they were, of course, bound to adopt the ordinary precautions to discover danger, as well as to avoid its consequences after it became known.

The fact that the road was fenced at the place of collision with the horses, was a circumstance to be considered in connection with the other circumstances of the case in determining whether the engineer was guilty of negligence in not looking ahead and discovering the danger in time to avoid it. The fact that the road was fenced rendered it less probable that wandering animals would be on the track; but it cannot be said that the engineer, as a matter of law, by reason of the fences, was wholly excused from keeping a lookout ahead of the train.

If the servants of the company in charge of the train, having due regard to their duties for the safety of the persons and property in their charge, could, by the exercise of ordinary care, have seen and saved the horses, we think they were bound to have done so. *Bemis* v. *Conn., &c. R. R., supra*, 381; *Louis. & Nash. R. R. Co.* v. *Wainscott*, 3 Bush, 149. *Judgment affirmed.*

CLARK J., IN JEFFRIES *v.* SEABOARD, &c., R. R. CO.

1901. 129 *North Carolina*, 236, pp. 240, 241.

CLARK, J. The defendant's counsel rest their exception upon an expression in the opinion in *Bottoms* v. *Railroad*, 114 N. C. 704, 25 L. R. A. 784, 41 Am. St. Rep. 799, which, in general terms, approved a charge of the judge below containing the sentence that if the engineer was so occupied about his engine that he did not see the helpless person on the track in time to avoid the injury, the defendant would not be liable. But that identical point was an issue and reviewed in *Arrowood* v. *Railroad*, 126 N. C. 629. In that case the court said: "The duty of keeping a lookout is on the defendant. If it can keep a proper lookout by means of the engineer alone, well and good. If, for any reason, a proper lookout cannot be kept without the aid of the fireman, he also should be used. If, by reason of their duties, either the fireman or the engineer, or both, are so hindered that a proper lookout cannot be kept, then it is the duty of the defendant, at such places on its road, to have a third man employed for that indispensable duty. In *Pickett* v. *Railroad*, 117 N. C. 634, 30

L. R. A. 257, 53 Am. St. Rep. 611; *Lloyd* v. *Railroad*, 118 N. C. 1012, 54 Am. St. Rep. 764, and a long line of similar cases, it is held that it is the duty of the *defendant* to keep a proper lookout. It is not held anywhere that such lookout as the engineer may be incidentally able to give will relieve the company, if that lookout is not a proper lookout." [1]

SEAMAN, J., IN SHEEHAN *v.* ST. PAUL & DULUTH R. R. CO.

1896. 46 *U. S. Appeals*, 498, pp. 505–507.

SEAMAN, J. The plaintiff at the time of his injury was neither in the relation of passenger nor of one in a public crossing or place in which the public were licensed to travel, but upon the undisputed facts was a mere intruder on the tracks of the defendant, technically a trespasser; and this record excludes any of the elements of implied license or invitation to such use which have given rise to much discussion and diversity of views in the courts. Therefore the inquiry is here squarely presented, What is the duty which a railway company owes to a trespasser on its tracks, and how and when does the duty arise? The decisions upon this subject uniformly recognize that the trespasser cannot be treated as an outlaw; and at the least that, if wantonly injured in the operation of the railroad, the company is answerable in damages. Clearly, then, an obligation is placed upon the company to exercise some degree of care when the danger becomes apparent. Is it, however, bound to foresee or assume that rational beings will thus enter as trespassers in a place of danger, and to exercise in the running of its trains the constant vigilance in view of that probability which is imposed for public crossings? There are cases which would seem to hold this strict requirement (see note, 1 Thompson on Negligence (1880), 448; *East Tennessee and Georgia Railroad Co.* v. *St. John*, 5 Sneed, 524); but by the great preponderance of authority, in this country and in England, the more reasonable doctrine is pronounced, in effect, as follows: That the railroad

[1] "Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal, or other obstruction appears upon the road the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident." Tennessee Statute; Shannon's Code of Tennessee Annotated, Ed. 1896, Section 1574 (4).

"It is the duty of all persons running trains in this state upon any railroad, to keep a constant lookout for persons and property upon the track of any and all railroads, and if any person or property shall be killed or injured by the neglect of any employees of any railroad to keep such lookout, the company owning and operating any such railroad shall be liable and responsible to the person injured for all damages resulting from neglect to keep such lookout, and the burden of proof shall devolve upon such railroad to establish the fact that this duty has been performed." Arkansas Statute of April 8, 1891; Sandels and Hill's Digest of the Statutes of Arkansas, Ed. 1894, Section 6207.

company has the right to a free track in such places; that it is not bound to any act or service in anticipation of trespassers thereon; and that the trespasser who ventures to enter upon a track for any purpose of his own assumes all risks of the conditions which may be found there, including the operation of engines and cars. *Wright* v. *Boston and Maine Railroad*, 129 Mass. 440; *Philadelphia and Reading Railroad Company* v. *Hummell*, 44 Penn. St. 375. The decision by this court, in *Cleveland, Cincinnati, Chicago and St. Louis Railway Company* v. *Philips' Administrator* (1), 24 U. S. Appeals, 489, adopts the view held in this line of cases, citing the authorities of which repetition here is unnecessary. The same doctrine prevails in Minnesota, where the injury in question arose. *Johnson* v. *Truesdale*, 46 Minnesota, 345; *Studley* v. *St. Paul & Duluth R. Co.*, 48 Minnesota, 249. In the latter case it was held that there could be no recovery "unless the engineer saw the girl in time to avoid the accident, and then was guilty of such gross negligence in not trying to avoid it as to evince a reckless disregard of human life"; and the opinion gives this further exposition of the rule: "The defendant's engineer was under no obligation to anticipate a trespasser, or to look out for persons walking upon the track; but, upon discovering plaintiff's intestate across the cattle-guard, as he claims she was when he noticed that she was in danger, it became the engineer's duty to use proper care to avoid running her down. If he failed to exercise proper care, he would necessarily be grossly negligent, and evince a reckless disregard of human life." So in Wisconsin, in *Anderson* v. *Chicago, St. Paul, Minneapolis & Omaha Railway Company*, 87 Wisconsin, 195, 204, it is said: "The use of a railroad is exclusively for its owners or those acting under its authority, and the company is not bound to the exercise of any active duty of care or diligence towards mere trespassers upon its track, to keep a lookout to discover or protect them from injury, except that, when discovered in a position of danger or peril, it is its duty to use all reasonable and proper effort to save and protect them from the probable consequences of their indiscretion or negligence."

The well-established and just rule which holds the railroad company to the exercise of constant and strict care against injury through its means is applicable only to the relation on which it is founded, of an existing duty or obligation. This active or positive duty arises in favor of the public at a street crossing or other place at which it is presumable that persons or teams may be met. It is not material, so far as concerns this inquiry, whether the place is one for which a lawful right of passage exists, as it is the fact of notice to the company arising out of its existence and the probability of its use which imposes the positive duty to exercise care; the requirement of an extreme degree of care being superadded because of the hazards which attend the operations of the company. The case of a trespasser on the track in a place not open to travel is clearly distinguishable in the absence

of this notice to the company. There is no constructive notice upon which to base the obligation of constant lookout for his presence there, and no actual notice up to the moment the trainmen have discovered the fact of his peril. As that peril comes wholly from his unauthorized act and temerity, the risk and all positive duty of care for his safety rest with the trespasser. The obligation of the company and its operatives is not then preëxisting, but arises at the moment of discovery, and is negative in its nature, — a duty which is common to human conduct to make all reasonable effort to avert injury to others from means which can be controlled.

This is the issue presented here. It excludes all inquiry respecting the character of the roadbed, cattle-guard, locomotive, brake appliances or other means of operation, or of the speed or manner of running the train up to the moment of notice, because no breach of positive duty is involved. It is confined to the evidence relating to the discovery by the engineer and fireman of the plaintiff's peril and to the efforts then made to avert the injury; and out of that to ascertain whether, in any view which may justly be taken, it is shown that these men or the engineer in disregard of the duty which then confronted them neglected to employ with reasonable promptness the means at hand for stopping the train.

FEARONS *v.* KANSAS CITY ELEVATED R. R. CO.

1904. 180 *Missouri*, 208.[1]

ACTION to recover for the death of Geo. R. Fearons, who was run over in a tunnel by defendant's car. Part of the testimony is summarized in the opinion.

At the close of plaintiff's testimony the trial court sustained a demurrer to the evidence; whereupon the plaintiff took a nonsuit, with leave, &c. The trial court afterwards, on plaintiff's motion, set aside the nonsuit, and made an order granting a new trial. From that order defendant appealed.

J. H. Lucas, for appellant.

Gage, Ladd & Small, for respondent.

FOX, J. This unfortunate accident occurred in a tunnel, which the testimony shows connects two sections of a large and populous city. The defendant was operating its railway through this tunnel, and the husband of respondent was killed by being run over by one of defendant's cars.

The record in this cause discloses, beyond dispute, testimony by witnesses living in the neighborhood of the tunnel, tending to prove

[1] Statement abridged. Arguments omitted. Only a small part of opinion is given. — ED.

that it was a custom and habit of workmen, in going to and returning from their work, also children and numerous other people, of walking through this tunnel. The proof further tends to show that this was a daily occurrence, and had been for a number of years, some of the witnesses fixing the period at five, others at seven and ten years.

The only objection to the use of this tunnel was indicated by the sign, "No Admittance." This signal was not heeded, and if the number of pedestrians passed through the tunnel daily, as the testimony tends to show, it is but a fair and reasonable inference that the motormen and conductors operating defendant's cars continually, knew that this signal, "No Admittance," was unheeded, and that the numerous people spoken of by the witnesses were using this tunnel as a passway.

It is upon this particular branch of the testimony that the legal proposition before us hinges.

It is earnestly contended and very ably argued by appellant that plaintiff's husband was a mere trespasser, and that the railway company owed him no duty, and hence cannot be made to respond in damages for his death, except on a showing that he was wantonly, wilfully and recklessly killed by defendant's agents and employees, in the operation of the cars.

On the other hand, it is with equal ability and earnestness contended and argued, by respondent's counsel, that even though it be conceded that the deceased had no legal right to pass through the tunnel, and may be classed as a trespasser, the allegations in the petition as to the use by the public of the tunnel as a passway, and the testimony tending to prove such allegation, constitute the exception to the rule contended for by appellant.

These two contentions sharply present the only vital question involved in this controversy.

. . . . . .

The distinction drawn by this court may be briefly stated thus: that, whenever the motorman or engineer, in the operation of its cars, before reaching a point along the line of its railway, has reasonable ground to expect or anticipate the presence of persons so near the railroad track as to endanger them, then the law, through its high regard for the preservation of human life, requires and demands such operatives to be on the alert, and to keep a lookout for the realization of the anticipation or expected presence of the person. Of course, this rule requires that the facts surrounding the given case shall be of such character as would warrant any reasonably prudent man to expect or anticipate the presence of the persons at the point on its road, and the burden of establishing these facts rests upon the party alleging them. On the other hand, the operatives of a railway are entitled to the presumption that there is a clear track, and while care and caution should be exercised in the operation of their trains, they are not responsible to trespassers for failure to be on the alert to discover them, in the

absence of any reasonable grounds for the expectation or anticipation of their presence on the track. In other words, they are not specially required to look out for persons who have no right to be there and whose presence was neither expected nor anticipated. Under those circumstances, the liability results from a wanton and reckless injury inflicted, after the discovery of their presence. But, again, if it is at a point where there is reasonable ground for expecting or anticipating the presence of persons, the presumption of a clear track is destroyed, and even though the persons be trespassers, it does not relieve those in charge of the moving cars from keeping a careful lookout for the person so expected to be present at that point.

There was sufficient testimony in this cause, at least, tending to show a state of facts, in respect to the use of this tunnel as a foot passageway, from one section of the city to the other, as would authorize the submission of the case to the jury.

As before indicated, the court should place the burden upon plaintiff, of establishing such daily use of this tunnel by the people, and the knowledge of it by defendant, as would reasonably warrant those in charge of the car in expecting and anticipating the presence of persons going through this passageway.

[Omitting remainder of opinion.]

Judgment (setting aside nonsuit and granting plaintiff a new trial), *Affirmed.*

MYERS *v.* BOSTON & MAINE R. R.

1903. 72 *New Hampshire*, 175.

Case, for personal injuries. Transferred from the April term, 1902, of the Superior Court by Peaslee, J. The evidence showed that the plaintiff was run over by an engine while he was upon the defendants' track at West Lebanon. He was not there on business with the defendants, but for his own convenience. At the close of the plaintiff's evidence a nonsuit was ordered, subject to exception.

Martin & Howe, for the plaintiff.

Streeter & Hollis, for the defendants.

Bingham, J. Notwithstanding the plaintiff was a trespasser upon the defendants' premises at the time he received his injury, it was the duty of the defendants in the exercise of ordinary care to avoid injuring him through their active intervention, if they knew of his presence in a dangerous situation, or if their failure to learn of it was due to their culpable ignorance. In other words, they were in fault if they failed to use due care to discover his presence in a position of danger when circumstances existed which would put a man of average prudence upon inquiry. *Mitchell* v. *Railroad*, 68 N. H. 96; *Shea* v. *Railroad*, 69 N. H. 361, 363.

This does not mean that the defendants were bound to ascertain and take precautions in reference to the plaintiff's possible or chance presence in a dangerous situation upon their premises, but that they were required not to actively injure him if circumstances existed that warranted their anticipating his presence in such a situation as a probable occurrence. *Shea* v. *Railroad, supra; Davis* v. *Railroad,* 70 N. H. 519.

The trial justice, in entering the order of nonsuit, must have ruled as a matter of law that the defendants could not reasonably be required to anticipate the presence of the plaintiff upon their track in a position of danger at the time their servant signalled the engineer to back the engine. If this ruling was right, the order must stand.

[After stating and discussing the evidence.] A jury would not be warranted in finding that the switchman [who gave a signal to back the engine] was bound to anticipate that the plaintiff would negligently step upon the track as a probable occurrence. *Waldron* v. *Railroad,* 71 N. H. 362, 365, 366. The nonsuit was properly ordered.

Exception overruled.

BUCH *v.* AMORY MANUFACTURING CO.

1897. 69 *New Hampshire,* 257.

CASE. Trial by jury and verdict for the plaintiff. March 30, 1886, the plaintiff, then eight years of age and unable to speak or understand English, was injured by the machinery in operation in the defendants' mill. The evidence tended to show that the plaintiff's brother, who was thirteen years of age, was employed as a back-boy in the mule-spinning room, and that at his request the plaintiff went into the room for the purpose of learning the work of a back-boy. The elder brother had no authority to request or permit the plaintiff to go into the mill or to instruct him, unless it could be inferred from the fact testified to by him that "he saw other boys taking their brothers to learn, as he understood from their motions." The plaintiff was in the mill for a day and a half until the accident, openly assisting more or less in the work of the back-boys. He testified that he was directed by a person not the overseer of the room, whom he saw "bossing" the other boys, to pick up some bobbins and put some waste in a box. There was evidence tending to show that Fulton, the overseer, who was in charge of and hired the back-boys and other operatives in the room, passed in the alleys near the plaintiff, and that he was well acquainted with his help. He testified that he had no knowledge of the plaintiff's presence in the room until about two hours before the accident, when, aware that the boy was not an employee, he directed him to go out, and thinking he might not understand English, took him to

an operative who spoke the plaintiff's language, whom he told to send the plaintiff out. The plaintiff testified that Fulton spoke to him and, as he understood, directed him to remove his vest, but that he did not understand he was ordered to leave. There was no evidence except Fulton's that the order was communicated to the plaintiff or understood by him. There was no evidence or claim that the machinery was improperly constructed or operated, or that it was out of repair. The plaintiff's hand was caught in a gearing which the back-boys were instructed to avoid, but there was no evidence that the plaintiff was given any instruction or warning whatever. There was evidence tending to prove that boys under thirteen years of age were not employed in the room, and that the place and machinery were dangerous for a child of the plaintiff's age. Subject to exception, a motion that a verdict be directed for the defendants was denied.

Sullivan & Broderick and *Burnham, Brown & Warren,* for the plaintiff.

David Cross, David A. Taggart, and *Elijah M. Topliff,* for the defendants.

CARPENTER, C. J. On the evidence, the jury could not properly find that the plaintiff was upon the premises of the defendants with their consent or permission. Although there was evidence tending to show that other back-boys had taken their brothers into the room for the purpose of instructing them in the business, there was no sufficient evidence that the fact that they did so was known to the defendants, and there was evidence that on the first occasion brought to their knowledge they objected. Upon this state of the evidence, a license by the defendants — whether material or immaterial — for the plaintiff's presence in the room could not legitimately be inferred. The plaintiff was a trespasser.

The defendants' machinery was in perfect order and properly managed. They were conducting their lawful business in a lawful way and in the usual and ordinary manner. During the plaintiff's presence they made no change in the operation of their works or in their method of doing business. No immediate or active intervention on their part caused the injury. It resulted from the joint operation of the plaintiff's conduct and the ordinary and usual condition of the premises. Under these circumstances, an adult in full possession of his faculties, or an infant capable of exercising the measure of care necessary to protect himself from the dangers of the situation, whether he was on the premises by permission or as a trespasser, could not recover.

The plaintiff was an infant of eight years. The particular circumstances of the accident — how or in what manner it happened that the plaintiff caught his hand in the gearing — are not disclosed by the case. It does not appear that any evidence was offered tending to

show that he was incapable of knowing the danger from putting his hand in contact with the gearing, or of exercising a measure of care sufficient to avoid the danger. Such an incapacity cannot be presumed. *Stone* v. *Railroad*, 115 N. Y. 104, 109–111; *Hayes* v. *Norcross*, 162 Mass. 546, 548; *Mulligan* v. *Curtis*, 100 Mass. 512, 514; *Cosgrove* v. *Ogden*, 49 N. Y. 255, 258; *Kunz* v. *Troy*, 104 N. Y. 344, 351; *Lovett* v. *Railroad*, 9 Allen 557, 563.

An infant is bound to use the reason he possesses and to exercise the degree of care and caution of which he is capable. If the plaintiff could by the due exercise of his intellectual and physical powers have avoided the injury, he is no more entitled to recover than an adult would be under the same circumstances. The burden was upon him, and the case might be disposed of upon the ground that he adduced no evidence tending to show that he had not sufficient reason and discretion to appreciate the particular risk of injury that he incurred and to avoid it. But it may be that evidence tending to show the plaintiff's incapacity was adduced, and that the case is silent on the subject because this particular question was not made by the defendants.

Assuming, then, that the plaintiff was incapable either of appreciating the danger or of exercising the care necessary to avoid it, is he, upon the facts stated, entitled to recover? He was a trespasser in a place dangerous to children of his age. In the conduct of their business and management of their machinery the defendants were without fault. The only negligence charged upon or attributed to them is that, inasmuch as they could not make the plaintiff understand a command to leave the premises and ought to have known that they could not, they did not forcibly eject him.

Actionable negligence is the neglect of a legal duty. The defendants are not liable unless they owed to the plaintiff a legal duty which they neglected to perform. With purely moral obligations the law does not deal. For example, the priest and Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might and morally ought to have prevented or relieved. Suppose A, standing close by a railroad, sees a two-year-old babe on the track and a car approaching. He can easily rescue the child with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury, or indictable under the statute for its death. P. S., *c.* 278, *s.* 8.

"In dealing with cases which involve injuries to children, courts . . . have sometimes strangely confounded legal obligation with sentiments that are independent of law." *Indianapolis* v. *Emmelman*, 108 Ind. 530. "It is important to bear in mind, in actions for injuries to children, a very simple and fundamental fact, which in this class of cases is sometimes strangely lost sight of, viz., that no action arises

without a breach of duty." 2 Thomp. Neg. 1183, note 3. "No action will lie against a spiteful man, who, seeing another running into danger, merely omits to warn him. To bring the case within the category of actionable negligence some wrongful act must be shown, or a breach of some positive duty; otherwise, a man who allows strangers to roam over his property would be held answerable for not protecting them against any danger they might encounter whilst using the license." *Gautret* v. *Egerton*, L. R. 2 C. P. 371, 375.

What duties do the owners owe to a trespasser upon their premises? They may eject him, using such force and such only as is necessary for the purpose. They are bound to abstain from any other or further intentional or negligent acts of personal violence, — bound to inflict upon him by means of their own active intervention no injury which by due care they can avoid. They are not bound to warn him against hidden or secret dangers arising from the condition of the premises (*Redigan* v. *Railroad*, 155 Mass. 44, 47, 48), or to protect him against any injury that may arise from his own acts or those of other persons. In short, if they do nothing, let him entirely alone, in no manner interfere with him, he can have no cause of action against them for any injury that he may receive. On the contrary, he is liable to them for any damage that he by his unlawful meddling may cause them or their property. What greater or other legal obligation was cast on these defendants by the circumstance that the plaintiff was (as is assumed) an irresponsible infant?

If landowners are not bound to warn an adult trespasser of hidden dangers, — dangers which he by ordinary care cannot discover and, therefore, cannot avoid, — on what ground can it be claimed that they must warn an infant of open and visible dangers which he is unable to appreciate? No legal distinction is perceived between the duties of the owners in one case and the other. The situation of the adult in front of secret dangers which by no degree of care he can discover, and that of the infant incapable of comprehending danger, is in a legal aspect exactly the same. There is no apparent reason for holding that any greater or other duty rests upon the owners in one case than in the other.

There is a wide difference — a broad gulf — both in reason and in law, between causing and preventing an injury; between doing by negligence or otherwise a wrong to one's neighbor, and preventing him from injuring himself; between protecting him against injury by another and guarding him from injury that may accrue to him from the condition of the premises which he has unlawfully invaded. The duty to do no wrong is a legal duty. The duty to protect against wrong is, generally speaking and excepting certain intimate relations in the nature of a trust, a moral obligation only, not recognized or enforced by law. Is a spectator liable if he sees an intelligent man or an unintelligent infant running into danger and does not warn or forcibly restrain him? What difference does it make whether the danger is on

another's land, or upon his own, in case the man or infant is not there by his express or implied invitation? If A sees an eight-year-old boy beginning to climb into his garden over a wall stuck with spikes and does not warn him or drive him off, is he liable in damages if the boy meets with injury from the spikes? *Degg* v. *Railway*, 1 H. & N. 773, 777. I see my neighbor's two-year-old babe in dangerous proximity to the machinery of his windmill in his yard, and easily might, but do not, rescue him. I am not liable in damages to the child for his injuries, nor, if the child is killed, punishable for manslaughter by the common law or under the statute (P. S., *c.* 278, *s.* 8), because the child and I are strangers, and I am under no legal duty to protect him. Now suppose I see the same child trespassing in my own yard and meddling in like manner with the dangerous machinery of my own windmill. What additional obligation is cast upon me by reason of the child's trespass? The mere fact that the child is unable to take care of himself does not impose on me the legal duty of protecting him in the one case more than in the other. Upon what principle of law can an infant by coming unlawfully upon my premises impose upon me the legal duty of a guardian? None has been suggested, and we know of none.

An infant, no matter of how tender years, is liable in law for his trespasses. 1 Ch. Pl. 86; 2 Kent 241; Cool. Torts, 103; Poll. Torts 46; 2 Add. Torts 1126, 1153; 10 Am. & Eng. Enc. Law 668, *et seq.*; *Humphrey* v. *Douglass*, 10 Vt. 71; *School District* v. *Bragdon*, 23 N. H. 507; *Eaton* v. *Hill*, 50 N. H. 235; *Bullock* v. *Babcock*, 3 Wend. 391; *Williams* v. *Hays*, 143 N. Y. 442, 446–451; *Conklin* v. *Thompson*, 29 Barb. 218; *Neal* v. *Gillett*, 23 Conn. 437; *Huchting* v. *Engel*, 17 Wis. 237. If, then, the defendants' machinery was injured by the plaintiff's act in putting his hand in the gearing, he is liable to them for the damages in an action of trespass and to nominal damages for the wrongful entry. It would be no answer to such an action that the defendants might by force have prevented the trespass. It is impossible to hold that while the plaintiff is liable to the defendants in trespass, they are liable to him in case for neglecting to prevent the act which caused the injury both to him and them. Cases of enticement, allurement, or invitation of infants to their injury, or setting traps for them, and cases relating to the sufficiency of public ways, or to the exposure upon them of machinery attractive and dangerous to children, have no application here.

Danger from machinery in motion in the ordinary course of business cannot be distinguished from that arising from a well, pit, open scuttle, or other stationary object. The movement of the works is a part of the regular and normal condition of the premises. *Sullivan* v. *Railroad*, 156 Mass. 378; *Holbrook* v. *Aldrich*, 168 Mass. 15; *Rodgers* v. *Lees*, 140 Pa. St. 475. The law no more compels the owners to shut down their gates and stop their business for the protection of a trespasser than it requires them to maintain a railing about

an open scuttle or to fence in their machinery for the same purpose. *Benson* v. *Company*, 77 Md. 535; *Mergenthaler* v. *Kirby*, 79 Md. 182. There was no evidence tending to show that the defendants neglected to perform any legal duty to the plaintiff. *McGuiness* v. *Butler*, 159 Mass. 233, 236, 238; *Grindley* v. *McKechnie*, 163 Mass. 494; *Holbrook* v. *Aldrich*, 168 Mass. 15, 17, and cases cited.

Verdict set aside: judgment for the defendants

PARSONS, J., did not sit: the others concurred.

FROST *v.* EASTERN RAILROAD.

1886. 64 *New Hampshire*, 220.

CASE, for personal injuries from the alleged negligence of the defendants in not properly guarding and securing a turn-table. The plaintiff, who sues by his father and next friend, was seven years old when the accident occurred, June 23, 1877, and the action was commenced June 7, 1884. Plea, the general issue and statute of limitations. A motion for a nonsuit was denied, and the defendants excepted. Verdict for the plaintiff. The facts are sufficiently stated in the opinion.

Dodge & Caverly and *W. J. Copeland*, for plaintiff.

J. S. H. Frink and *C. B. Gafney*, for defendants.

CLARK, J. The action is not barred by the statute of limitations. "Any infant, married woman, or insane person may bring any personal actions within two years after such disability is removed." G. L., c. 221, s. 7.

As a general rule, in cases where a disability exists when the right of action accrues, the statute does not run during the continuance of the disability, and it has not commenced to run against the plaintiff. *Pierce* v. *Dustin*, 24 N. H. 417; *Little* v. *Downing*, 37 N. H. 356. It is said that the plaintiff's next friend was under no disability, that he could have brought the action at any time within six years after the right of action accrued, and therefore the statute should apply to this case. It is an answer to this suggestion that it is the infant's action, and the failure of the next friend to bring suit within six years is no bar to the plaintiff's right of action. Wood Lim. of Act. 476.

The motion for a nonsuit raises the question whether there was evidence upon which the jury could properly find a verdict for the plaintiff. *Paine* v. *Railway*, 58 N. H. 611. The ground of the action is, that the defendants were guilty of negligence in maintaining a turn-table insecurely guarded, which, being wrongfully set in motion by older boys, caused an injury to the plaintiff, who was at that time seven years old, and was attracted to the turn-table by the noise of the older and larger

boys turning and playing upon it. The turn-table was situated on the defendants' land, about sixty feet from the public street, in a cut with high, steep embankments on each side; and the land on each side was private property and fenced. It was fastened by a toggle, which prevented its being set in motion unless the toggle was drawn by a lever, to which was attached a switch padlock, which being locked prevented the lever from being used unless the staple was drawn. At the time of the accident the turn-table was fastened by the toggle, but it was a controverted point whether the padlock was then locked. When secured by the toggle and not locked with the padlock, the turn-table could not be set in motion by boys of the age and strength of the plaintiff.

Upon these facts we think the action cannot be maintained. The alleged negligence complained of relates to the construction and condition of the turn-table, and it is not claimed that the defendants were guilty of any active misconduct towards the plaintiff. The right of a landowner in the use of his own land is not limited or qualified like the enjoyment of a right or privilege in which others have an interest, as the use of a street for highway purposes under the general law, or for other purposes under special license (*Moynihan* v. *Whidden*, 143 Mass. 287), where care must be taken not to infringe upon the lawful rights of others. At the time of his injury the plaintiff was using the defendants' premises as a playground without right. The turn-table was required in operating the defendants' railroad. It was located on its own land so far removed from the highway as not to interfere with the convenience and safety of the public travel, and it was not a trap set for the purpose of injuring trespassers. *Aldrich* v. *Wright*, 53 N. H. 404. Under these circumstances, the defendants owed no duty to the plaintiff; and there can be no negligence or breach of duty where there is no act or service which the party is bound to perform or fulfil. A landowner is not required to take active measures to insure the safety of intruders, nor is he liable for an injury resulting from the lawful use of his premises to one entering upon them without right. A trespasser ordinarily assumes all risk of danger from the condition of the premises; and to recover for an injury happening to him he must show that it was wantonly inflicted, or that the owner or occupant, being present and acting, might have prevented the injury by the exercise of reasonable care after discovering the danger. *Clark* v. *Manchester*, 62 N. H. —; *State* v. *Railroad*, 52 N. H. 528; *Sweeny* v. *Railroad*, 10 Allen, 368; *Morrissey* v. *Railroad*, 126 Mass. 377; *Severy* v. *Nickerson*, 120 Mass. 306; *Morgan* v. *Hallowell*, 57 Me. 375; *Pierce* v. *Whitcomb*, 48 Vt. 127; *McAlpin* v. *Powell*, 70 N. Y. 126; *St. L., V. & T. H. R. R. Co.* v. *Bell*, 81 Ill. 76; *Gavin* v. *Chicago*, 97 Ill. 66; *Wood* v. *School District*, 44 Iowa, 27; *Gramlich* v. *Wurst*, 86 Pa. St. 74; *Cauley* v. *P. C., & St. Louis Railway Co.*, 95 Pa. St. 398; *Gillespie* v. *McGowan*, 100 Pa. St. 144; *Mangan* v. *Atterton*, L. R. 1 Ex. 239. The maxim that a man must use his property so as not to incommode his neighbor, only applies to neighbors who do not interfere with it or enter upon it.

Knight v. *Abert*, 6 Pa. St. 472. To hold the owner liable for consequential damages happening to trespassers from the lawful and beneficial use of his own land would be an unreasonable restriction of his enjoyment of it.

We are not prepared to adopt the doctrine of *Railroad Co.* v. *Stout*, 17 Wall. 657, and cases following it, that the owner of machinery or other property attractive to children is liable for injuries happening to children wrongfully interfering with it on his own premises. The owner is not an insurer of the safety of infant trespassers. One having in his possession agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling, nor is the owner of a fruit-tree bound to cut it down or enclose it, or to exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys who may be attracted by the fruit. Neither is the owner or occupant of premises upon which there is a natural or artificial pond, or a blueberry pasture, legally required to exercise care in securing his gates and bars to guard against accidents to straying and trespassing children. (The owner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists.) "The supposed duty has regard to the public at large, and cannot well exist as to one portion of the public and not to another, under the same circumstances. In this respect children, women, and men are upon the same footing. In cases where certain duties exist, infants may require greater care than adults, or a different kind of care; but precautionary measures having for their object the protection of the public must as a rule have reference to all classes alike." *Nolan* v. *N. Y. & N. H. & H. Railroad Co.*, 53 Conn. 461.

There being no evidence to charge the defendants with negligence, the motion for a nonsuit should have been granted.

Exceptions sustained.

KEFFE *v.* MILWAUKEE AND ST. PAUL RAILWAY CO.

1875. 21 *Minnesota*, 207.

THE plaintiff, an infant, brought this action in the Court of Common Pleas for Ramsey County to recover damages for injuries sustained while playing upon a turn-table of defendant. The circumstances under which plaintiff was injured are thus stated in the complaint: "That in connection with said railroad" [of defendant] "defendant, before and up to the month of October, 1867, used and operated a certain turn-table, located on the lands of said defendant in said town of Northfield, which said turn-table was so constructed and arranged as to be easily turned around and made to revolve in a horizontal direction."

After minutely describing the turn-table, the complaint proceeds: "That said turn-table was situated in a public place, near to a passenger depot of the defendant, and within 120 feet from the residence and home of plaintiff. That said turn-table was unfastened and in no way protected, fenced, guarded, or enclosed, to prevent it from being turned around at the pleasure of small children, although the same could at all times be readily locked and securely fastened.

"That said turn-table . . . was in the possession and under the control of defendant, and not necessary in operating said railroad, and it was the duty of said defendant to keep said turn-table fastened or in some way protected, so that children could not readily have access thereto and revolve the same. That the same was not so protected or fastened, and that said turn-table, when left unfastened, was very attractive to young children, and that while the same was being moved by children, and at all times when left unfastened, it was dangerous to persons upon or near it.

"That defendant had notice of all the aforesaid facts before and at the time the injury herein named occurred to the plaintiff.

"That plaintiff, on September 11, 1867, was a child of tender years, without judgment or discretion, he being at that date seven years old, and that in consequence of the carelessness, negligence, and improper conduct of said defendant, in not locking, enclosing, or otherwise fastening said turn-table, and by the negligence, carelessness, and improper conduct of said defendant, its agents, and servants, in allowing said turn-table to be and remain unfastened, insecure, and improperly put in motion, it was, at the date last aforesaid, revolved by other children, over whom the parents and guardians of plaintiff had no control, and without their knowledge, and, while being so revolved, the plaintiff, being on said turn-table, had his right leg caught near the knee, between the surface of said turn-table and said abutment or wall, and between the iron rail on said turn-table and the iron rail on said abutment or wall, and said leg was thereby so bruised, broken, mangled, and fractured, as to render amputation necessary."

The complaint further alleges that the injury was caused by defendant's negligence, and without any fault or negligence on the part of the plaintiff, or his parents or guardians, etc.

The defendant having answered the complaint, and the action having been called for trial, the defendant moved for judgment on the pleadings. The motion was granted by Hall, J., and judgment entered accordingly, from which plaintiff appealed.

Mead & Thompson, for appellant.

Bigelow, Flandrau & Clark, for respondent, relied on the opinion of Hall, J., and the cases therein cited.[1]

YOUNG, J. In the elaborate opinion of the Court below, which formed the basis of the argument for the defendant in this Court, the case is

[1] This opinion, too long to be inserted here, will be found in 2 Cent. Law Journal, 170.

treated as if the plaintiff was a mere trespasser, whose tender years and childish instincts were no excuse for the commission of the trespass, and who had no more right than any other trespasser to require the defendant to exercise care to protect him from receiving injury while upon its turn-table. But we are of opinion that, upon the facts stated in the complaint, the plaintiff occupied a very different position from that of a mere voluntary trespasser upon the defendant's property, and it is therefore unnecessary to consider whether the proposition advanced by the defendant's counsel, viz., that a landowner owes no duty of care to trespassers, is not too broad a statement of a rule which is true in many instances.

To treat the plaintiff as a voluntary trespasser is to ignore the averments of the complaint, that the turn-table, which was situate in a public (by which we understand an open, frequented) place, was, when left unfastened, very attractive, and, when put in motion by them, was dangerous to young children, by whom it could be easily put in motion, and many of whom were in the habit of going upon it to play. The turn-table, being thus attractive, presented to the natural instincts of young children a strong temptation; and such children, following, as they must be expected to follow, those natural instincts, were thus allured into a danger whose nature and extent they, being without judgment or discretion, could neither apprehend nor appreciate, and against which they could not protect themselves. The difference between the plaintiff's position and that of a voluntary trespasser, capable of using care, consists in this, that the plaintiff was induced to come upon the defendant's turn-table by the defendant's own conduct, and that, as to him, the turn-table was a hidden danger, — a trap.

While it is held that a mere licensee "must take the permission with its concomitant conditions, — it may be perils," *Hounsell* v. *Smyth*, 7 C. B. (N. S.) 731; *Bolch* v. *Smith*, 7 H. & N. 836, yet even such licensee has a right to require that the owner of the land shall not knowingly and carelessly put concealed dangers in his way. *Bolch* v. *Smyth*, *per* Channell and Wilde, BB.; *Corby* v. *Hill*, 4 C. B. (N. S.) 556, *per* Willes, J.

And where one goes upon the land of another, not by mere license, but by invitation from the owner, the latter owes him a larger duty. "The general rule or principle applicable to this class of cases is that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any inducement, invitation, or allurement, either express or implied, by which they have been led to enter thereon." *Per* Bigelow, C. J., in *Sweeny* v. *Old Colony & Newport R. Co.*, 10 Allen, 368, reviewing many cases. And see *Indermaur* v. *Dames*, L. R. 1 C. P. 274; L. R. 2 C. P. 311.

Now, what an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years. If the defendant had left this turn-table unfastened for the purpose of attract-

ing young children to play upon it, knowing the danger into which it was thus alluring them, it certainly would be no defence to an action by the plaintiff, who had been attracted upon the turn-table and injured, to say that the plaintiff was a trespasser, and that his childish instincts were no excuse for his trespass. In *Townsend* v. *Wathen*, 9 East, 277, it was held to be unlawful for a man to tempt even his neighbor's dogs into danger, by setting traps on his own land, baited with strong-scented meat, by which the dogs were allured to come upon his land and into his traps. In that case, Lord Ellenborough asks, "What is the difference between drawing the animal into the trap by his natural instinct, which he cannot resist, and putting him there by manual force?" And Grose, J., says, "A man must not set traps of this dangerous description in a situation to invite his neighbor's dogs, and, as it were, to compel them by their instinct to come into the traps."

It is true that the defendant did not leave the turn-table unfastened, for the purpose of injuring young children; and if the defendant had no reason to believe that the unfastened turn-table was likely to attract and to injure young children, then the defendant would not be bound to use care to protect from injury the children that it had no good reason to suppose were in any danger. But the complaint states that the defendant knew that the turn-table, when left unfastened, was easily revolved; that, when left unfastened, it was very attractive, and when put in motion by them, dangerous, to young children; and knew also that many children were in the habit of going upon it to play. The defendant therefore knew that by leaving this turn-table unfastened and unguarded, it was not merely inviting young children to come upon the turn-table, but was holding out an allurement, which, acting upon the natural instincts by which such children are controlled, drew them by those instincts into a hidden danger; and having thus knowingly allured them into a place of danger, without their fault (for it cannot blame them for not resisting the temptation it has set before them), it was bound to use care to protect them from the danger into which they were thus led, and from which they could not be expected to protect themselves.

We agree with the defendant's counsel that a railroad company is not required to make its land a safe play-ground for children. It has the same right to maintain and use its turn-table that any landowner has to use his property. It is not an insurer of the lives or limbs of young children who play upon its premises. We merely decide that when it sets before young children a temptation which it has reason to believe will lead them into danger, it must use ordinary care to protect them from harm. What would be proper care in any case must, in general, be a question for the jury, upon all the circumstances of the case.

The position we have taken is fully sustained by the following cases, some of which go much farther in imposing upon the owner of dangerous articles the duty of using care to protect from injury children

who may be tempted to play near or meddle with them, than it is necessary to go in this case. *Lynch* v. *Nurdin*, 1 Q. B. 29; *Birge* v. *Gardiner*, 19 Conn. 507; *Whirley* v. *Whiteman*, 1 Head, 610.

It is true that, in the cases cited, the principal question discussed is not whether the defendant owed the plaintiff the duty of care, but whether the defendant was absolved from liability for breach of duty by reason of the fact that the plaintiff was a trespasser, who, by his own act, contributed to the injury; and the distinction is not sharply drawn between the effect of the plaintiff's trespass, as a bar to his right to require care, and the plaintiff's contributory negligence, as a bar to his right to recover for the defendant's failure to exercise such care as it was his duty to use. But as a young child, whom the defendant knowingly tempts to come upon his land, if anything more than a technical trespasser, is led into the commission of the trespass by the defendant himself, and thus occupies a position widely different from that of an ordinary trespasser, the fact that the Courts, in the cases referred to, assumed, instead of proving, that the defendant owed to a young child, under such circumstances, a duty he would not owe to an ordinary trespasser, for whose trespass he was not in any way responsible, does not weaken the authority of those cases. And in *Railroad Co.* v. *Stout*, 17 Wall. 657 (a case in all respects similar to the present), the distinction insisted on by counsel is taken by Mr. Justice Hunt, and the circumstance that the plaintiff was in some seuse a trespasser is held not to exempt the defendant from the duty of care. In the charge of the learned circuit judge at the trial of the last named case (reported under the title of *Stout* v. *Sioux City & Pacific R. Co.*, 2 Dillon, 294), the elements which must concur to render the defendant liable, in a case like the present, are clearly stated.

In *Hughes* v. *Macfie*, 2 Hurlst. & Coltm. 744, and *Mangan* v. *Atterton*, L. R. 1 Exch. 239, cited by defendant's counsel, there was nothing to show that the defendants knew or had reason to apprehend that the cellar lid in the one case, or the crushing machine in the other, would be likely to attract young children into danger. It must be conceded that *Hughes* v. *Macfie* is not easily to be reconciled with *Birge* v. *Gardiner*, and that *Mangan* v. *Atterton* seems to conflict with *Lynch* v. *Nurdin;* but whether correctly decided or otherwise, they do not necessarily conflict with our decision in this case.

Much reliance is placed by defendant on *Phila. & Reading R. Co.* v. *Hummell*, 44 Penn. St. 375, and *Gillis* v. *Penn. R. Co.*, 59 Penn. St. 129. In the first of these cases, the plaintiff, a young child, was injured by coming upon the track while the cars were in motion. The only negligence charged upon the defendant was the omission to give any signal at or after the starting of the train. If the plaintiff had been crossing the track, through one of the openings which the company had suffered the people in the neighborhood to make in the train while standing on the track, and the cars had then been run together upon him, without any warning, the case would more nearly resemble

the present; but the facts, as they appear, show that the company used abundant care, and that it had no reason to suppose that the plaintiff was exposed to danger; and the decision is put upon the latter ground, although Strong, J., delivering the opinion of the Court, uses language which lends some support to the defendant's contention in this case. *Gillis* v. *Penn. R. Co.* was properly decided, on the ground that the company did nothing to invite the plaintiff upon the platform, by the fall of which he was injured, and that the platform was strong enough to bear the weight of any crowd of people which the company might reasonably expect would come upon it. Neither of these cases is an authority against, while a later case in the same court, *Kay* v. *Penn. R. Co.*, 65 Penn. St. 269, tends strongly to support, the plaintiff's right of action in this case; and the recent case of *Pittsburg, A. & M. Passenger R. Co.* v. *Caldwell*, 74 Penn. St. 421, points in the same direction.

It was not urged upon the argument that the plaintiff was guilty of contributory negligence, and we have assumed that the plaintiff exercised, as he was bound to do, such reasonable care as a child of his age and understanding was capable of using, and that there was no negligence on the part of his parents or guardians, contributing to his injury.

Judgment reversed.

SECTION III.

Duty of Care towards Licensee.

HOUNSELL *v.* SMYTH, ET ALS.

1860. 7 *Common Bench Reports, New Series*, 731.[1]

THE declaration alleged, in substance, that defendants were seized of certain waste land, upon which was a quarry situated near to and between two public highways leading over said waste land; that said waste land was wholly unenclosed and open to the public, and that all persons having occasion to cross and pass over the waste land had been accustomed to go upon and across the same without interruption or hindrance from, and with the license and permission of, the owners of the land; that the quarry was dangerous to persons who might accidentally deviate or stray, or who might have occasion to cross over the waste land for the purpose of passing from one of said roads to the other of them beside or near the quarry; that defendants, well knowing the premises, negligently and improperly, and contrary to their duty in that behalf, left the quarry wholly unfenced and unguarded, and took no care for guarding the public or any person so accidentally deviating from the roads, or passing over the waste land, from falling into the quarry; that plaintiff, in the night, having occasion to pass along one of the roads, and having accidentally taken the wrong one, was crossing the waste land for the purpose of getting into the other road, and, not being aware of the existence and locality of the quarry, and being unable by reason of the darkness to perceive the same, fell in and was hurt.

The defendants demurred to the declaration, and also pleaded certain pleas to which the plaintiff demurred.

Karslake, for defendant.

Kingslake, *Serjt.*, for plaintiff.

WILLIAMS, J. [The learned judge first considered whether the declaration would have been sufficient, if it had omitted the allegation, that persons had been accustomed to pass over the land without interruption from, and with the permission of, the owners. He said that the declaration did not allege that the excavation was so near a public road as to constitute a public nuisance; and that the declaration, without the allegation as to the acquiescence or permission of the owners, would clearly have been bad; referring to *Barnes* v. *Ward*, 9 C. B. 392; *Hardcastle* v. *South Yorkshire R. Co.*, 4 H. & N. 67; *Blyth* v. *Topham*, Cro. Jac. 158. He proceeded as follows: —] Then, how is the

[1] Statement abridged. Arguments omitted. — ED.

case altered by the introduction of the allegation, "that all persons having occasion to cross or pass over the said waste land have been used and accustomed to go upon, along, and across the same without interruption or hindrance from, and with the license and permission of, the owners of such waste land?" No right is alleged; it is merely stated that the owners allowed all persons who chose to do so, for recreation or for business, to go upon the waste without complaint, — that they were not churlish enough to interfere with any person who went there. One who thus uses the waste has no right to complain of an excavation he finds there. He must take the permission with its concomitant conditions, and, it may be, perils. Suppose the owner of land near the sea gives another leave to walk on the edge of a cliff, surely it would be absurd to contend that such permission cast upon the former the burthen of fencing? Can it make any difference that there is a public highway open to but at some distance from the cliff? A resemblance has been suggested between this case and that of *Corby* v. *Hill*, 4 C. B. N. S. 556 (E. C. L. R. vol. 93); but there is really no analogy between them. In that case the defendant held out an inducement to persons to come upon the land, by permitting it to be used as the means of access to his house, and therefore he was bound to warn persons so using the road of the obstruction which had been placed there. The principle upon which that case was decided very closely approximates to that which is stated in *Barnes* v. *Ward*. All that can be said in this case is, that the plaintiff had a tacit permission to cross the waste. It was not the fault of the defendants that he was ignorant of the existence and locality of the quarry, and of the danger he incurred by crossing the same in the dark. Upon the whole, it seems to me that this case is not distinguishable from *Blyth* v. *Topham*, and does not fall within the exception established by *Barnes* v. *Ward*, and acted upon in *Hardcastle* v. *The South Yorkshire Railway Company*. I therefore think our judgment must be for the defendants.

[KEATING, J., delivered a concurring opinion.]

Judgment for defendants.

REARDON *v.* THOMPSON.

1889. 149 *Massachusetts*, 267.

HOLMES, J. This is an action for personal injuries caused by the plaintiff's falling into a hole, which was dug, we will assume, by the defendant, and which was nine inches in the defendant's land and extended nine inches into the land of a neighbor, Mrs. Appleton, by her license. The land in question was a strip eight feet wide, running back from Pope Street, in East Boston, between the defendant's house and Mrs. Appleton's. Of this eight feet, nine inches only belonged to the

defendant, and seven feet three inches to Mrs. Appleton. The plaintiff was going to another house of the defendant on the rear end of her lot, to which the proper entrance was from the rear. So far as appears, she was on Mrs. Appleton's land at the time of the accident.

The argument for the plaintiff is based on the assumption that she was invited to pass over the eight-foot strip. But there is no evidence that she was invited there either by the defendant or by Mrs. Appleton. The failure, if there was any, to prohibit the use of the strip was not an invitation to use it. *Galligan* v. *Metacomet Manuf. Co.*, 143 Mass. 527. Neither were the facts that the houses were near together, and that the only approach to the rear house, directly from Pope Street, was over the strip. The defendant's lawful obstruction of her own land was not an invitation to go upon Mrs. Appleton's, and Mrs. Appleton's partial obstruction of her land was not an invitation to persons visiting the defendant's tenants to go upon the unobstructed part. We must assume that there was a lawful passage from the rear house to some street. The defendant was under no obligation to furnish short cuts from every street in the neighborhood. This is not a case like *Toomey* v. *Sanborn*, 146 Mass. 28, where a third person was held liable for opening a hole in what was conceded to be a private way.

The fair conclusion from the plaintiff's evidence is that she was a trespasser. But if we assume that the jury might have found that there had been such use of the strip and such acquiescenee on the part of the owners as to imply a license, still the plaintiff cannot recover. No doubt a bare licensee has some rights. The landowner cannot shoot him. It has been held that an owner would be liable for negligently bringing force to bear upon the licensee's person, as by running him down without proper warning. *Byrne* v. *New York Central & Hudson River Railroad*, 104 N. Y. 362; *Taylor* v. *Delaware & Hudson Canal Co.*, 113 Penn. St. 162, 175. Compare *Metcalfe* v. *Cunard Steamship Co.*, 147 Mass. 66; *Batchelor* v. *Fortescue*, 11 Q. B. D. 474. It is not necessary to say that no species of pitfall or trap could be conceived for which a landowner would be answerable. *Bolch* v. *Smith*, 7 H. & N. 736, 747.

But the general rule is, that a licensee goes upon land at his own risk, and must take the premises as he finds them. An open hole, which is not concealed otherwise than by the darkness of night, is a danger which a licensee must avoid at his peril. *Sweeny* v. *Old Colony & Newport Railroad*, 10 Allen, 368, 372; *Zoebisch* v. *Tarbell*, 10 Allen, 385; *Heinlein* v. *Boston & Providence Railroad*, 147 Mass. 136; *Files* v. *Boston & Albany Railroad*, *ante*, 204; *Hounsell* v. *Smyth*, 7 C. B. (N. S.) 731; *Sullivan* v. *Waters*, 14 Ir. C. L. 460; *Parker* v. *Portland Publishing Co.*, 69 Me. 173; *Byrne* v. *New York Central & Hudson River Railroad*, 104 N. Y. 362, and cases cited.

Exceptions overruled.

W. N. Osgood, for the plaintiff.

J. A. Maxwell, for the defendant.

E. GAUTRET, Administratrix of LEON GAUTRET *v.* EGERTON et als.

L. JONES, Administratrix of JOHN JONES, *v.* EGERTON et als.

1867. *Law Reports*, 2 *Common Pleas*, 371.

The declaration in the first of these actions stated that the defendants were possessed of a close of land, and of a certain canal and cuttings intersecting the same, and of certain bridges across the said canal and cuttings, communicating with and leading to certain docks of the defendants, which said land and bridges had been and were from time to time used with the consent and permission of the defendants by persons proceeding towards and coming from the said docks; that the defendants, well knowing the premises, wrongfully, negligently, and improperly kept and maintained the said land, canal, cuttings, and bridges, and suffered them to continue and be in so improper a state and condition as to render them dangerous and unsafe for persons lawfully passing along and over the said land and bridges towards the said docks, and using the same as aforesaid; and that Leon Gautret, whilst he was lawfully in and passing and walking along the said close and over the said bridge, and using the same in the manner and for the purpose aforesaid, by and through the said wrongful, negligent, and improper conduct of the defendants as aforesaid, fell into one of the said cuttings of the defendants, intersecting the said close as aforesaid, and thereby lost his life within twelve calendar months next before the suit: and the plaintiff, as administratrix, for the benefit of herself, the widow of the said Leon Gautret, and A. Gautret, &c., according to the statute in such case made and provided, claimed 2,500*l.*

The defendants demurred to the declaration, on the ground that "it does not appear that there was any legal duty or obligation on the part of the defendants to take means for preventing the said land, &c., being dangerous and unsafe." Joinder.

The declaration in *Jones* v. *Egerton* was the same as the above, and there was a like demurrer.

Crompton (*Mellish, Q. C.*, with him), in support of the demurrers.—To maintain these actions, the declarations ought to show a *duty* in the defendants to keep the canal, cuttings, and bridges in a safe condition, and also that some invitation had been held out to the deceased to come there, and that the thing complained of constituted a sort of trap. *Seymour* v. *Maddox*, 16 Q. B. 326 (E. C. L. R. vol. 71), 19 L. J. Q. B. 525; *Corby* v. *Hill*, 4 C. B. N. S. 556 (E. C. L. R. vol. 93), 27 L. J. C. P. 318. These declarations are entirely wanting in all these particulars. It is not enough to show that the defendants were aware that the place in question was in an unsafe condition, and that the public were in the habit of passing along it. *Hounsell* v. *Smyth*, 7 C. B. N. S. 731 (E. C. L. R. vol. 97), 29 L. J. C. P. 203.

[WILLES, J. The declaration does not even state that the deceased persons were unacquainted with the state of the place.]

Herschell, for the plaintiff Gautret. — The question raised upon this declaration is, whether there is any duty on the part of the defendants towards persons using their land as the deceased here did. That may be negligence in the case of a license, which would not be negligence as against a mere trespasser: and, if there can be any case in which the law would imply a duty, it is sufficiently alleged here.

[WILLES, J. It may be the duty of the defendants to abstain from doing any act which may be dangerous to persons coming upon the land by their invitation or permission, as in *Indermaur* v. *Dames*, Law Rep. 1 C. P. 274.[1] So, if I employ one to carry an article which is of a peculiarly dangerous nature, without cautioning him, I may be responsible for any injury he sustains through the absence of such caution. That was the case of *Farrant* v. *Barnes*, 11 C. B. N. S. 553 (E. C. L. R. vol. 103), 31 L. J. C. P. 137. But, what duty does the law impose upon these defendants to keep their bridges in repair? If I dedicate a way to the public which is full of ruts and holes, the public must take it as it is; if I dig a pit in it, I may be liable for the consequences: but, if I do nothing, I am not.]

It was not necessary to specify the nature of the negligence which is charged: it was enough to allege generally a duty and a breach of it. Knowing the bridge to be unsafe, it was the duty of the defendants not to permit the public to use it. In *Bolch* v. *Smith*, 7 H. & N. 736, 31 L. J. Ex. 201, the defect in the fencing of the shaft was apparent: but the judgments of Channell and Wilde, BB., seem to concede that, if there had been a concealed defect, the action would have been maintainable. That shows that there is some duty in such a case as this.

Potter, for the plaintiff Jones, submitted that the implied request on the part of the defendants to persons having occasion to go to the docks to pass by the way in question, raised a duty in them to keep it in a safe condition.

Crompton was not called upon to reply.

WILLES, J. I am of opinion that our judgment must be for the defendants in each of these cases. The argument urged on behalf of the plaintiffs, when analyzed, amounts to this, that we ought to construe the general words of the declaration as describing whatever sort of negligence the plaintiffs can prove at the trial. The authorities, however, and reason and good sense, are the other way. The plaintiff must, in his declaration, give the defendant notice of what his complaint is. He must recover *secundum allegata et probata*. What is it that a declaration of this sort should state in order to fulfil those conditions? It ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged. It is not enough to show that the defendant has been guilty

[1] Affirmed on appeal, L. R. 2 C. P. p. 311.

of negligence, without showing in what respect he was negligent, and how he became bound to use care to prevent injury to others. All that these declarations allege is, that the defendants were possessed of land, and of a canal and cuttings intersecting the same, and of certain bridges across the canal and cuttings communicating with and leading to certain docks of theirs; that they allowed persons going to and from the docks, whether upon the business or for the profit of the defendants or not, to pass over the land; and that the deceased persons, in pursuance of and using that permission, fell into one of the cuttings, and so met their deaths. The consequences of these accidents are sought to be visited upon these defendants, because they have allowed persons to go over their land, not alleging it to have been upon the business or for the benefit of the defendants, or as the servants or agents of the defendants; nor alleging that the defendants have been guilty of any wrongful act, such as digging a trench on the land, or misrepresenting its condition, or anything equivalent to laying a trap for the unwary passengers; but simply because they permitted these persons to use a way with the condition of which, for anything that appears, those who suffered the injury were perfectly well acquainted. That is the whole sum and substance of these declarations. If the docks to which the way in question led were public docks, the way would be a public way, and the township or parish would be bound to repair it, and no such liability as this could be cast upon the defendants merely by reason of the soil of the way being theirs. That is so not only in reason but also upon authority. It was so held in *Robbins* v. *Jones*, 15 C. B. N. S. 221 (E. C. L. R. vol. 109), 33 L. J. C. P. 1, where a way having been for a number of years dedicated to the public, we held that the owner of the adjoining house was not responsible for death resulting to a person from the giving way of the pavement, partly in consequence of its being overweighted by a number of persons crowding upon it, and partly from its having been weakened by user. Assuming that these were private docks, the private property of the defendants, and that they permitted persons going to or coming from the docks, whether for their own benefit or that of the defendants, to use the way, the dedication of a permission to use the way must be taken to be in the character of a gift. The principle of law as to gifts is, that the giver is not responsible for damage resulting from the insecurity of the thing, unless he knew its evil character at the time, and omitted to caution the donee. There must be something like fraud on the part of the giver before he can be made answerable. It is quite consistent with the declarations in these cases that this land was in the same state at the time of the accident that it was in at the time the permission to use it was originally given. To create a cause of action, something like fraud must be shown. No action will lie against a spiteful man who, seeing another running into a position of danger, merely omits to warn him. To bring the case within the category of actionable negligence, some wrongful act must be shown, or a breach of some positive duty: otherwise, a man who allows stran-

gers to roam over his property would be held to be answerable for not protecting them against any danger which they might encounter whilst using the license. Every man is bound not wilfully to deceive others, or do any act which may place them in danger. It may be, as in *Corby* v. *Hill*, 4 C. B. N. S. 556 (E. C. L. R. vol. 93), 27 L. J. C. P. 318, that he is responsible if he puts an obstruction on the way which is likely to cause injury to those who by his permission use the way; but I cannot conceive that he could incur any responsibility merely by reason of his allowing the way to be out of repair. For these reasons, I think these declarations disclose no cause of action against the defendants, and that the latter are therefore entitled to judgment.

KEATING, J. I am of the same opinion. It is not denied that a declaration of this sort must show a duty and a breach of that duty. But it is said that these declarations are so framed that it would be necessary for the plaintiffs at the trial to prove a duty. I am, however, utterly unable to discover any duty which the defendants have contracted towards the persons whom the plaintiffs represent, or what particular breach of duty is charged. It is said that the condition of the land and bridges was such as to constitute them a kind of trap. I cannot accede to that. The persons who used the way took it with all its imperfections.

Herschell asked and obtained leave to amend within ten days, on payment of costs; otherwise judgment for the defendants.

Judgment accordingly.[1]

[1] [The judge at the trial in charging the jury] "suggested that the measure of duty towards a bare licensee is different, where the licensor accepts the duty of carrying him, from what it is where he merely permits him to pass through his premises; and I think the cases support this view. . . . I think it was competent for the jury to find, as they must be taken to have found, a failure of that ordinary care which is due from a person who undertakes the carriage of another gratuitously. The principle in all cases of this class is that the care exercised must be reasonable; and the standard of reasonableness naturally must vary according to the circumstances of the case, the trust reposed, and the skill and appliances at the disposal of the person to whom another confides a duty. There is an obvious difference between the measure of confidence reposed and responsibility accepted in the case of a person who merely receives permission to traverse the premises of another, and in the case where a person or his property is received into the custody of another for transportation: see in the case of goods, *Southcote's Case*, (1601) 4 Rep. 83 b., cited in *Coggs* v. *Bernard*, 1 Smith, L. C. 11th ed., p. 173, and the notes thereto. In the case of persons received for carriage, PARKE, B., says in *Lygo* v. *Newbold*, (1854) 9 Ex. 302, at p. 305: 'A person who undertakes to provide for the conveyance of another, although he does so gratuitously, is bound to exercise due and reasonable care.' In *Austin* v. *Great Western Ry. Co.*, (1867) L. R. 2 Qu. B. 442, at p. 445, BLACKBURN, J., says: 'I think that what was said in the case of *Marshall* v. *York, Newcastle and Berwick Ry. Co.*, (1851) 11 C. B. 655, was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely.'"

COLLINS, M. R., in *Harris* v. *Perry*, L. R. (1903), 2 K. B. 219, pp. 225, 226. And see, also, Sington on Negligence, pp. 61, 62.

In the case of a gratuitous loan of a chattel, the lender owes no duty to the borrower except to give warning of any defects actually known to the lender. *Gagnon* v. *Dana*, 69 N. H. 264; *Coughlin* v. *Gillison*, L. R. (1899), 1 Qu. B. 145. "A contract of gratuitous service, however, such as one of carriage, involves a duty of reasonable care, and must therefore be distinguished from a contract of gratuitous bailment or a gift, which does not." Salmond on Torts, 361. — ED.

CAMPBELL *v.* BOYD.

1883. 88 *North Carolina*, 129.

CIVIL ACTION tried at Fall Term, 1882, of Beaufort Superior Court, before Gilliam, J.

The defendant appealed.

Mr. George H. Brown, Jr., for plaintiff.

No counsel for defendant.

SMITH, C. J. The defendant owns and operates a mill, that has been built and used for one hundred years, at the head of Pungo creek. A few yards below its site the creek divides, and its waters flow in two separate streams. Along its course on either side run parallel public roads each two miles distant, and from them have been constructed private ways leading up to and meeting at the mill, and affording convenient access from the roads to it. One of these ways was opened by former proprietors, and the other in the year 1867, by the defendant.

In 1875 or 1876, the defendant, with other owners of the intervening land, united in opening a connecting way, between those leading from the public roads, from near points in each, so as to form a direct passway across the two divergent streams from one road to the other, without going up to the mill. Over these waters they also constructed bridges. While this direct route was opened mainly for the convenience of the defendant and his associates, whose lands were traversed, it was also used as well by the public with full knowledge of the defendant, and without objection from any one in passing between the roads.

In February, 1882, the plaintiff, with his horse, while in the use of this connecting way and passing one of the bridges, broke through, and both were precipitated into the creek, and the damage sustained for the redress of which the suit is brought.

The flooring of the bridge was sound, and there was no visible indication of weakness or decay to put a person passing over it on his guard. But the timbers underneath, and hidden by the floor, were in a rotten and unsound condition, and of this the defendant had full knowledge before the disaster.

He was at his mill and saw what occurred, and going up to the place remarked to the plaintiff that when he saw him about to enter the bridge he thought of calling him to stop, but did not do so; that the bridge was unsafe, and he regretted he did not stop the plaintiff from crossing.

These are the material facts found by the judge, under the consent of parties that he should pass upon the evidence and ascertain the facts of the case, and our only inquiry is upon the correctness of his ruling that the defendant is liable in damages to the plaintiff, and from which the defendant appeals.

The only case in our reports bearing upon the point is that of *Mulholland* v. *Brownrigg*, 2 Hawks, 349. There, the defendant's mill-pond overflowed parts of the public road, and hollow bridges had been erected, but by whom, did not appear; nor was it shown that they were built at the expense of the public. This condition of things had existed for twenty years, and the mill had been owned and operated by the defendant for the space of five years. The successive mill proprietors had kept the overflowed bed of the road and the bridges in repair. The plaintiff's wagon, loaded with goods, passing a bridge, broke through, in consequence of its decayed state, and the goods were injured by the water. The action was for this injury. It was declared by the Court that as a nuisance was created by the flooding of the road, and the defendant had undertaken to remedy it in constructing the bridges, it was his duty, as that of preceding proprietors of the mill, to maintain them in a proper condition of repair, and ensure the safety of those persons who in using the road had to pass over them, and that the damage having resulted from his negligence he was liable to the plaintiff. The proposition is asserted, that inasmuch as the defendant has undertaken to remedy a nuisance of his own creating, by constructing the bridge, he undertakes also and is bound to keep it in sufficient repair, and is answerable for the consequences of his neglect to do so.

The principle of law, in more general terms and with a wider scope, is thus expressed by Hoar, J., in *Combs* v. *New Bed. Con. Co.*, 102 Mass. 584. "There is another class of cases in which it has been held that, if a person allows a dangerous place to exist in premises occupied by him, he will be responsible for injury caused thereby, to any other person entering upon the premises by his invitation and procurement, express or implied, and not notified of the danger, if the person injured is in the use of due care."

"The principle is well settled," remarks Appleton, C. J., "that a person injured, without neglect on his part, by a defect or obstruction in a way or passage over which he has been induced to pass for a lawful purpose, by an invitation express or implied, can recover damages for the injury sustained, against the individual so inviting, and being in default for the neglect." *Tobin* v. *P.S.* and *P. R. R.*, 59 Maine, 188.

Several illustrations of the principle in its different applications will be found in Wharton on Negligence, § 826, and following.

The facts of the present case bring it within the rule thus enunciated. The way was opened by the defendant and his associates; primarily, though it was for his and their accommodation, yet, permissively, to the general travelling public. It has, in fact, been thus used, and known to the defendant to be thus used, with the acquiescence of himself and the others; and under these circumstances it may fairly be assumed to be an invitation to all who have occasion thus to use it; and hence a voluntary obligation is incurred to keep the bridges in a safe condition, so that no detriment may come to travellers.

Reparation is an inseparable incident of its construction, and, as the obligation to repair rests on no other, the liability for neglect must rest on those who put the bridges there and invited the public to use them.

It is true the way might have been closed, or the public prohibited by proper notices from passing over it, and no one could complain of the exercise of the right to do so; but as long as the way is left open and the bridges remain for the public to use, it is incumbent on those who constructed and maintain them to see that they are safe for all.

The law does not tolerate the presence over and along a way in common use, of structures apparently sound, but in fact ruinous, like man-traps, inviting travellers to needless disaster and injury. The duty of reparation should rest on some one, and it can rest on none others but those who built and used the bridges, and impliedly at least invite the public to use them also. For neglect of this duty they must abide the consequences.

We hold, therefore, that there is no error, and the judgment must be affirmed.

No error. *Affirmed.*

GALLAGHER *v.* HUMPHREY.

1862. 6 *Law Times Reports, New Series*, 684; *S. C.* 10 *Weekly Reporter*, 664.[1]

Declaration. That the defendant was possessed of a crane fixed upon the New Hibernia Wharf, in a certain passage called Montague Close, Southwark, along which passage the plaintiff and others were permitted to pass, repass, and use the same as a way to certain wharves; that the crane was used by the defendant and his servants to raise and lower goods over the passage; that the plaintiff was, with the permission of the proprietors of the passage, lawfully passing along the said passage to the said wharves; yet the defendant, by himself and his servants, so negligently, &c. managed, directed, and conducted themselves that by and through such neglect, &c., a part of the said crane broke whilst the defendant, by his servants, was using the same, and certain goods fell upon the plaintiff whilst he was passing along, &c. and broke both his legs, &c.

Pleas: 1. Not guilty. 2. That the plaintiff and others were not permitted by the proprietors of the said passage to pass, repass, and use the said passage as a way from a highway to certain wharves, as in the declaration charged. 3. That the plaintiff was not, with the permission of the proprietors of the said passage, lawfully passing along the said passage from the said highway to the said wharves, as in the declaration alleged.

[1] The case is reprinted from the Law Times Reports, except the opinions of Crompton, J., and Blackburn, J., which are taken from the Weekly Reporter. — Ed.

Issue on the said pleas.

At the trial before Blackburn, J., at the Croydon Summer Assizes, 1861, it was proved that the plaintiff, the son of a laborer employed in the erection of West Kent Wharf, under a contractor for the defendant's father, had, on the day when the accident happened, taken his father's dinner, according to his usual custom, to West Kent Wharf, and on his return was obliged to pass under a crane erected on the defendant's (Hibernia) wharf, and there employed in lowering barrels of sugar. As he was passing the chain broke, and 12 cwt. of sugar fell upon him, inflicting the injuries complained of. The breakage of the chain was caused by negligence in the mode of applying the breaks, for, after the sugar had been attached the chain of the crane was allowed to run, and then the man suddenly put on the break and the jerk caused the weight to rise and fall and the chain to break. Montague Close is approached by steps from London Bridge, the gate to which was usually opened very early in the morning, and numbers of persons, to the knowledge of the defendant, used to pass along the passage, and no objection was made to persons using the way if on legitimate business. The judge left the following questions to the jury: 1st, Was the accident caused by the negligence of the defendant, or was it a pure accident over which no one could have any control? 2d, Could the boy by reesonable care have avoided the accident? 3d, Were the plaintiff and others permitted to go up Montague Close by the owners? 4th, Did the defendant on the evidence as disclosed tacitly give permission to the plaintiff to pass that way? 5th, Was the boy going to the wharf for a legitimate purpose? The jury having answered all the questions in favor of the plaintiff, a verdict was entered for him, with leave for the defendant to move to set it aside and enter a verdict on the second and third issues. The damages were assessed at £100.

A rule *nisi* having been obtained calling on the plaintiff to show cause why the verdict should not be entered for the defendant on the second and third issues, —

Shee, Serjt., (*Grady* with him,) showed cause. On the form of the rule as obtained the plaintiff is clearly entitled to succeed, as there was evidence that the defendant did by his acts tacitly give permission to the boy to pass along the close for a lawful purpose, and the jury have so found. But the plaintiff is also entitled to succeed on the broader ground. In *Corby* v. *Hill*, 4 C. B. N. S. 556, it was held that the defendant was liable for the negligence of his servant in placing materials in a dangerous position, and without notice, on a private road along which persons were accustomed to pass by leave of the owners; and in *Southcott* v. *Stanley*, 25 L. J. 339, Ex., a visitor to a person's house was held entitled to recover for injuries caused by opening a glass door which was insecure, and which it was necessary for him to open. (He was then stopped by the Court.)

Petersdorff, Serjt. (*Bridge* with him), in support of the rule. Montague Close was the defendant's private property, and no one had

any right to be there without his express or implied permission. The lowering heavy goods from the warehouses by cranes is a manifestly dangerous business, and persons using the way took upon themselves whatever risks might be incidental to that business. In *Hounsell* v. *Smyth*, 7 C. B. N. S. 743, where the defendant was held not to be liable for leaving a quarry unfenced on waste land across which the public were allowed to pass, Williams, J., said: "No right is averred, but merely that the owners allowed persons, for diversion or business, to go across the waste without complaint; that is, that they were not so churlish as to interfere with any one who went across. But a person so using the waste has no right to complain of any excavation he may find there; he must accept the permission with its concomitant conditions, and it may be its perils." [BLACKBURN, J. Have you any authority that persons so using the way take upon themselves the negligence of the servants about the place?] In *Bolch* v. *Smith*, 31 L. J. 201, Ex., where workmen employed in a dockyard were permitted to use a place as a way on which revolving machinery had been erected, it was held that the right so to use the place was only the right not to be treated as a trespasser, and that there was no obligation to fence the machinery, and no liability for insufficiently fencing it. [COCKBURN, C. J. There was the ordinary state of things in that case, and no superadded negligence.]

COCKBURN, C. J. I doubt whether on the pleadings and this rule it is competent to enter into the question of negligence, and whether the whole matter does not turn upon the question whether permission was or was not given to the plaintiff to pass along the way. But I should be sorry to decide this case upon that narrow ground. I quite agree that a person who merely gives permission to pass and repass along his close is not bound to do more than allow the enjoyment of such permissive right under the circumstances in which the way exists; that he is not bound, for instance, if the way passes along the side of a dangerous ditch or along the edge of a precipice, to fence off the ditch or precipice. The grantee must use the permission as the thing exists. It is a different question, however, where negligence on the part of the person granting the permission is superadded. It cannot be that, having granted permission to use a way subject to existing dangers, he is to be allowed to do any further act to endanger the safety of the person using the way. The plaintiff took the permission to use the way subject to a certain amount of risk and danger, but the case assumes a different aspect when the negligence of the defendant — for the negligence of his servants is his — is added to that risk and danger. The way in question was a private one leading to different wharves. On part of the way a wharf was being constructed or repaired, and the plaintiff's father was employed upon that work. It was the father's habit not to go home to his meals, and the boy used to take them to him at the wharf, and on this occasion was passing along carrying his father's dinner. The plaintiff was therefore passing along on a perfectly legitimate

purpose, and the evidence is that the defendant permitted the way to be used by persons having legitimate business upon the premises. That being so, the defendant places himself by such permission under the obligation of not doing anything by himself or his servants from which injury may arise, and if by any act of negligence on the part of himself or his servants injury does arise, he is liable to an action. That is the whole question. The plaintiff is passing along the passage by permission of the defendant, and though he could only enjoy that permission under certain contingencies, yet when injury arises not from any of those contingencies, but from the superadded negligence of the defendant, the defendant is liable for that negligence as much as if it had been upon a public highway.

WIGHTMAN, J. The rule in this case was obtained on a very narrow ground. The declaration having alleged that the plaintiff and others were permitted to pass, repass, and use the way in question, and that the plaintiff was there with the permission of the proprietors of the passage lawfully passing along the passage, the defendant took issue on the fact whether such right to pass along the passage was permitted by the defendant. I think that there was evidence to show that the plaintiff had the permission of the defendant to use the way, and that he was lawfully there at the time of the accident. I entirely agree with my Lord Chief Justice that the plaintiff is also entitled to succeed on the larger ground. It appears to me that such a permission as is here alleged may be subject to the qualification that the person giving it shall not be liable for injuries to persons using the way arising from the ordinary state of things, or of the ordinary nature of the business carried on; but that is distinguishable from the case of injuries wholly arising from the negligence of that person's servants.

CROMPTON, J. I am of the same opinion. I think we should look not only to the grounds upon which this rule was granted, but to the real defence set up by my brother Petersdorff. That defence is, in effect, that the plaintiff was using the way only under the qualified permission that he should be subject to any negligence of the plaintiff or his servants. If that defence be sustainable upon the general issue, or otherwise, we should see whether it is made out, and I am of opinion that it is not made out. I quite agree with what has fallen from my Lord and my brother Wightman. There may be a public dedication of a way, or a private permission to use it subject to a qualification; for example, subject to the danger arising from a stone step or a projecting house; and in such a case the public, or the persons using the way, take the right to use it subject to such qualification; but they are not thereby to be made subject to risks from what may be called active negligence. Whenever a party has a right to pass over certain ground, if injury occurs to him while so passing from negligence, he has a right to compensation. The argument of my brother Petersdorff fails therefore upon this ground. I think, too, that it is doubtful whether even the fact that the injured person was present unlawfully would excuse

negligence, though it would be an element in determining what is negligence, and what is not. In the present case, however, that question does not arise, as there is no doubt the plaintiff was there upon a legitimate errand.

BLACKBURN, J. I am of the same opinion. If the substantial defence raised existed I am not sure but what it could be raised under the present pleadings, and the leave reserved; but at any rate I think we could amend the pleadings, if necessary, to raise it. But I do not think that any such defence exists here. The plaintiff seeks to recover for the negligence of the defendant. Now, the existence of negligence depends upon the duty of the party charged with it. I concur with the judgment of the Court of Exchequer in *Bolch* v. *Smith* that, when permission is given to a person to pass through a yard where dangerous machinery is at work, no duty is cast upon the person giving such permission to fence the machinery against the person permitted so to pass. That decision does not touch the present case, which falls rather within the remark then made by my brother Wilde: "If persons in the condition of the defendant had left anything like a trap in route used on the premises, I am far from saying they would not be liable." This is more like the case of *Corby* v. *Hill*, where the matter placed upon the road is called a trap set for persons using it; and it is clear that when one gives another permission to pass over his land, it is his duty not to set a trap for him. Here the boy was passing upon a legitimate errand while the defendant's servants were employed in lowering weights. If he had sustained any injury by a weight descending, without any negligence of the defendant's servants, there is no doubt that he could not recover, but he suffered through the negligence of the persons lowering the bags, who were well aware that people were in the habit of passing below, and that danger would arise if the chain broke. I think, therefore, that it was the duty of the defendant and his servants to use ordinary care that the chain should not break. The jury have found that they neglected that duty, and I do not disagree with their finding. Our decision does not conflict with the judgment of the Court of Exchequer in *Bolch* v. *Smith*, or of the Common Pleas in *Hounsell* v. *Smyth*. *Rule discharged.*

BOLCH *v.* SMITH.

1862. 7 *Hurlstone & Norman*, 736.[1]

Action to recover for damage occurring as hereinafter stated. Pleas: first, not guilty; second, various special pleas. Issues thereon.

At the trial, before Channell, B., at the last Hampshire Summer Assizes, the following facts appeared: The plaintiff was a millwright employed in the Government dockyard at Portsmouth. The defendant was a contractor, and had been engaged for some time in enlarging one of the docks. The men employed in the dock-yard were not allowed to leave it during the day, and water-closets had been built for their use. For the purpose of going to these water-closets, they had permission to use certain paths which crossed the dock-yard. The defendant had been permitted to erect a mortar-mill for the purpose of his work, and he built an engine-house on one side of one of these paths and the mortar-mill on the other side of the path. A revolving shaft which connected the engine with the mill was placed across the path about six inches above the level of the ground. This shaft was partly covered with a few planks not joined together, and forming an incline upwards from the ground, so that a barrow could be wheeled over it. The shaft had been on that spot covered or uncovered for five years. The plaintiff had gone along this path to one of the water-closets, and whilst returning he accidentally stumbled when near the shaft, which was in rapid motion, and on reaching out his hand to save himself his left arm was caught by the shaft, and so much lacerated that it was necessary to amputate it. There were two other paths by which the plaintiff might have reached the water-closet; but the one he used was the shortest and most convenient.

In the course of the defendant's case it appeared that the shaft had been fenced to some extent but not sufficiently.

At the close of the defendant's case, the learned judge proposed to leave it to the jury to assess the damages, supposing the plaintiff had a right of action, and then to nonsuit the plaintiff, reserving leave for him to move to set aside the nonsuit, and enter the verdict for the amount assessed by the jury. The plaintiff's counsel declined to accede to this course; whereupon the learned judge left it to the jury to say: first, whether the plaintiff was lawfully using the way in question on the day of the accident; secondly, whether the defendant was guilty of negligence in leaving the shaft in the state it was on that day. The jury answered both questions in the affirmative, and they added that they found "that the shaft was not sufficiently fenced;" and they assessed the damages at 230*l.* A verdict having been entered for the plaintiff for that amount.

[1] Statement abridged. Arguments omitted, and parts of opinions. — Ed.

Coleridge, in last Michaelmas Term, obtained a rule nisi for a new trial, on the ground that the learned judge misdirected the jury in not telling them that there was no obligation on the part of the defendant to fence the shaft; and also that the verdict was against the evidence.

Montague Smith and *H. T. Cole* now showed cause.

Coleridge and *Thring* appeared in support of the rule, but were not called upon to argue.

CHANNELL, B. I am of opinion that the rule must be absolute for a new trial. [Remainder of opinion omitted.]

MARTIN, B. I am of the same opinion. The real objection to this action is that the plaintiff has failed to establish that there was any obligation or duty on the part of the defendant to have this path in any other condition than it was at the time of the accident. That should have been established in some way. If the plaintiff could have shown any such obligation on the part of the defendant he would have made out a case, but that was a condition precedent, and the plaintiff has wholly failed to do so. The defendant had a right to erect the machinery, to erect it in the place he did, and to work it in the manner he was doing.

Then what is the true condition of the plaintiff? It is said that he had a right to go along the path across which the machinery was erected, for he was a workman employed in the dock-yard, and had liberty to use the water-closet. But that is a fallacious argument. It is true the plaintiff had permission to use the path. Permission involves leave and license, but it gives no *right*. If I avail myself of permission to cross a man's land, I do so by virtue of a license, not of a right. It is an abuse of language to call it a right: it is an excuse or license, so that the party cannot be treated as a trespasser. Inasmuch as there was another way by which the plaintiff might have gone, but voluntarily chose the one which was out of order, I think he has no right of action against the defendant, and that he ought to have been nonsuited at the trial.

WILDE, B. I am of the same opinion. It is of importance in all these cases that the facts upon which the decisions are based should be made plain. The plaintiff was one of a number of persons who obtained leave and license from the dock-yard authorities to cross the yard from one place to another. The defendant had permission from the same authorities to put up certain machinery in the yard. The plaintiff while walking along the usual track fell down, not by reason of any obstruction, but in consequence of stumbling, and in trying to save himself, his arm came in contact with a revolving shaft and was lacerated.

I will decide the case as if it were a question between the plaintiff and the owners of the yard, because if they are not responsible for putting up the shaft, a fortiori the defendant is not. Then, was there any obligation on the owners of the yard not to put up machinery that

might be dangerous to persons crossing it? None of the facts tend to show that any such obligation existed. If what was put up was an obstruction to any person who used that way, the only consequence would be that he would have to go another way. That being so, it appears to me that this action cannot lie, because I agree that it is founded upon a duty, and none exists.

That disposes of the case; but I will add that I do not mean to say that if the defendant had made a hole in the yard, and had covered it in a way that was insufficient, but which appeared to be sufficient, he would not have been liable. But here there was nothing of that character. The danger was open and visible. There was nothing which could be called a "trap."

POLLOCK, C. B., concurred.

Rule absolute for a new trial.

CARSKADDON *v.* MILLS ET AL.

1892. 5 *Indiana Appellate Court*, 22.[1]

ACTION for damage to plaintiff's horse. Trial by the court. The case made by plaintiff's evidence was in substance as follows: —

Defendant purchased a lot of land in October, 1890. Across this lot ran a road leading from one street to another, having a well-defined track made by wagons, horses, etc. The road was not a public highway, but had been used by the travelling public generally for a period of from five to fifteen years. Defendant's lot was not fenced on the front and rear, the direction in which the road ran, but was fenced on the sides. After building a house on the lot, defendant "informed" the people travelling over this roadway not to use it any longer for such purpose; but no heed was paid to this. In the latter part of December, 1890, in order the more effectually to stop the travel over the lot, the defendant stretched a strand of barbed wire across the rear end of the lot, about three feet above the ground and at right angles, or nearly so, with said road. The entire fence was upon the appellee's lot. No notice of any kind was given of this obstruction otherwise than as it advertised itself. The wire could not be seen in the dark of night and only a short distance — twenty to twenty-five feet — in daylight. There were no posts that could be seen from the road in the night when the accident hereinafter alluded to occurred. The appellant, who lived in that community, had frequently travelled over the road leading across this lot, and had no notice or knowledge of its being closed up with the wire. The last time before the accident when he passed over the lot was in September or October, 1890. At about 6 o'clock on the evening of January 1, 1891, after it had become

[1] Statement abridged. — ED.

too dark to see this wire, the appellant attempted to drive across this lot, in the road, to perform some legitimate errand on the other side. Not knowing of the presence of the wire, he drove his horse briskly ahead of him until the animal came up suddenly against the barbs, cutting a gash in its front leg four to five inches in length and two inches deep, severing the frontal muscle, from which the horse was injured, to the damage of the appellant.

When the appellant had closed his evidence, the learned judge observed that he had examined the law of the case, and saw no reason why a man could not fence in his own land, on his own ground, and that, [if] "a travelling man over such property taking the license into his own hand, without invitation or inducement, because others do so, suffers injury, he must put up with it."

The judge ruled that plaintiff's evidence did not make out a *prima facie* right to recover; and found for defendant; denying plaintiff's motion for a new trial. Plaintiff appealed.

W. A. Funk, for appellaut.

A. L. Brick and *J. A. Judie*, for appellees.

REINHARD, C. J. [The learned judge said that a license may be created either by parol or by acquiescence in the use of the property for the purpose in question without objection. He *held*, that plaintiff was *prima facie* a licensee, and not a trespasser.]

A mere license, however, to travel over the land of another may be revoked at any time at the pleasure of the licensor. *Parish* v. *Kaspar*, 109 Ind. 586; *Simpson* v. *Wright*, 21 Ill. App. 67; 13 Am. & Eng. Encyc. of law, 555.

Where the license is once proved, however, or a *prima facie* case of such license has been made out, it then devolves upon the party asserting a revocation to prove it. *Blunt* v. *Barrett*, 54 N. Y. Sup. 548.

Consequently if the license in the present case was claimed to have been discontinued or revoked, the burden was upon appellees to show that fact.

Was such revocation established, or was there any evidence from which the court could infer the same?

The transfer of the property, or the fencing of the same, may, under ordinary circumstances, be sufficient to amount to a revocation. Ordinarily a man has a right to use his own property as he pleases, but at the same time this gives him no right to use it to the detriment or injury of his neighbor. We think the erection of an ordinary fence around the lot, one that was not calculated to inflict injury, was proper and right, and it was the privilege of the appellees to thus close up their premises without asking of any one the permission to do so. But whenever they undertook to inclose their property under circumstances that made it dangerous to those likely to pass over it, and which the appellees must anticipate would incur injury by it, it became their duty, if such dangerous means must be employed to accomplish the purpose, to give some sort of warning.

Thus it was held in *Houston, etc., R. W. Co.* v. *Boozer*, 70 Tex. 530, that if the owner of the land has been accustomed to permit others to use his property to travel over to such an extent as to produce a confident belief that the use will not be objected to, he must not mislead them by failing to give a proper warning of his intention to recall the permission. See, also, *Cornish* v. *Stubbs*, 5 L. R. C. P. 334; *Mellor* v. *Watkins*, L. R. 9 Q. B. 400.

While we grant the clear right of the appellees to revoke the license, we assert as emphatically that they must do so in a manner not calculated under ordinary circumstances to inflict injury unnecessarily. Although a licensee acquires no interest, as the term is usually employed, nor property right in the real estate over which he is allowed to travel, he yet has the right not to be wilfully or even recklessly injured by the acts of the owner. It cannot be said truthfully that the owner does not owe *some* duty to a licensee.

At the time of the stretching of the wire the appellees must have known that the public would continue to travel over this lot until in some way prevented from doing so. They must have known further that a single strand of wire, without posts at the roadside, or other means calculated to attract the attention of passers-by, could not be seen in the dark, and was a dangerous obstruction, liable to injure those coming in contact with it. They must, therefore, have anticipated just such results as the one that happened to the appellant. It was their clear duty, consequently, in case they desired to make use of the dangerous wire, to shut out the public from going over their lot, to give some warning by which the presence of the wire might be detected. Had they used an ordinary fence, one constructed out of material not necessarily dangerous to life and limb even if encountered in the dark, the case might be otherwise, and notice might not have been necessary. But the stretching of the barbed wire, without notice, under the circumstances was, we think, a plain violation of duty.

The case made by the evidence is one of more than mere passive negligence. In that class of cases it is well enough settled that there is no liability to a mere licensee. Thus where the owner of premises inadvertently leaves unguarded a pit, hatchway, trap-door, cistern, or other dangerous opening, and one who is present merely by permission and not by invitation, express or implied, falls into the opening and is injured, he cannot recover, as, in such case, he enjoys the license subject to the risks. *Thiele* v. *McManus*, 3 Ind. App. 132. But while an owner may not be liable to one who is thus injured by mere inattention and neglect of the owner, there could be no doubt of his liability if it were shown that the obstruction was placed there purposely to keep the licensee from entering the premises, or for the very purpose of inflicting injury if an attempt be made to cross. As well might an owner give permission to his neighbor to travel over his field and then set a trap to hurt him.

Where the owner of ground digs a pit or erects other dangerous

obstructions at a place where it is probable that persons or animals may go and become injured, without using proper care to guard the same, it is well settled in this state that there is a liability, and that the owner must respond in damages for any injury incurred by such negligence. *Young* v. *Harvey*, 16 Ind. 314; *Graves* v. *Thomas*, 95 Ind. 361; *Mayhew* v. *Burns*, 103 Ind. 328; *Penso* v. *McCormick*, 125 Ind. 116.

A barbed wire fence is not of itself an unlawful one, and the building of such along a public highway is not necessarily a negligent act; but yet, even in such case as that, there may be circumstances under which a person building such a fence, in a negligent manner, will be held liable for damages caused thereby. *Sisk* v. *Crump*, 112 Ind. 504. All these cases proceed upon the assumption that the party whose negligence caused the injury owed the other some duty which he failed to perform, for, after all, negligence is nothing more nor less than the failure to discharge some legal duty or obligation.

Even trespassers have some rights an owner is bound to respect. If a person, without permission, should attempt to cross the field of another, and tramp down his growing grain, it would not be contended, we apprehend, that this gave the owner any right to kill the trespasser, or even to seriously injure him unnecessarily. The use of spring guns, traps, and other devices to catch and injure trespassing persons or animals has been condemned both in this country and in England. *Hooker* v. *Miller*, 37 Iowa, 613; *Deane* v. *Clayton*, 7 Taunt. 489. If such means may not be employed against trespassers, we do not see upon what principle it can be held that it is proper to use them against one who has a permissive right to go upon the property where they are placed.

While in the case at bar there may be no proof of intentional injury, the facts, we think, bring the case within the principle declared in *Young* v. *Harvey*, *supra*; *Graves* v. *Thomas*, *supra*; *Penso* v. *McCormick*, *supra*; and *Sisk* v. *Crump*, *supra*.

The court should have sustained the motion for a new trial.

Judgment reversed.

McNEE *v.* COBURN TROLLEY TRACK COMPANY.

1898. 170 *Massachusetts*, 283.

Tort, for personal injuries occasioned to the plaintiff by the fall of an elevator upon which he was riding while in the defendant's employ. Trial in the Superior Court, before Mason, C. J., who directed the jury to return a verdict for the defendant; and reported the case for the determination of this court. If the case should have been submitted to the jury, judgment was to be entered for the plaintiff in a sum named; otherwise, judgment on the verdict. The facts sufficiently appear in the opinion.

The case was submitted on briefs to all the justices.

A. L. Green & W. C. Heywood, for the plaintiff.

H. A. King, for the defendant.

ALLEN, J. The general condition of the elevator was such that a jury might find that the defendant would be negligent in continuing its use for carrying workmen up and down while engaged in their work, if this was done without warning them of the risk. It is true that the particular defect which caused the accident was not open to observation or easy to discover. But there was evidence tending to show that the accident was caused by the use of the elevator while it was in a condition which rendered it unsuitable for use, and that the defendant was fairly put upon inquiry as to its safety; and that the defendant's duty in this respect was different from and greater than that of the workmen themselves.

The question then remains whether the posting of the notices in the elevator[1] showed such a performance by the defendant of its duty of warning or cautioning the workmen, or such contributory negligence or assumption of the risk on the part of the plaintiff, as to entitle the defendant to have the case withdrawn from the jury. While upon the evidence reported a verdict for the defendant would be more satisfactory, we are unable to hold that the defendant was entitled to such verdict as a matter of law. As a general rule, the sufficiency of such warning or caution is a question of fact for the jury. *Indermaur* v. *Dames*, L. R. 1 C. P. 274; s. c. L. R. 2 C. P. 311. It is true that the plaintiff was not at liberty to shut his eyes in order to avoid reading a plain notice of warning. If it be assumed that the plaintiff must be held chargeable with a knowledge of the contents of the notice, or at least that the defendant performed its duty of cautioning the workmen by posting the notices in the elevator, we think the plaintiff still had the right to go to the jury upon the question whether the notices remained in force at the time of the accident, or had become a dead letter. There was evidence tending to show that the notices were put in the elevator a long time before the accident by a former treasurer whose connection with the company had then ceased, that they had become soiled and somewhat indistinct and torn, and that all of the defendant's workmen, including the general superintendent of the building, were in the regular habit of using the elevator to carry them up and down, and had been so for some months prior to the accident. There was room for a legitimate argument that the defendant could not have intended to keep such a rule in force forever, and to furnish an elevator for permanent use by the men at their own sole risk; and that the defendant expected the men to use it while they were engaged in its work, and that it was for the defendant's advantage that they should do so, from the saving of time thereby secured. It might be found that the plaintiff, even if he knew

[1] These notices read as follows: "All persons riding on this elevator do so at their own risk."

of the terms of the notice, might nevertheless assume that its force had ceased.

If one who has posted a notice of entire prohibition permits it to be habitually disregarded, as, for instance, a notice not to ride on the platform of a street railway car, or in the baggage car of a train, a practical invitation to violate it may be inferred from habitual usage which is known to him. Long continued practice to the contrary may have the effect to supersede or show a waiver of the rule. *O'Donnell* v. *Allegheney Valley Railroad*, 59 Penn. St. 239; *Pennsylvania Railroad* v. *Langdon*, 92 Penn. St. 21; *Waterbury* v. *New York Central & Hudson River Railroad*, 17 Fed. Rep. 671. The notice in the present case was not one of entire prohibition, but, in the opinion of a majority of the court, the plaintiff upon the evidence had a right to go to the jury upon the question whether it still remained in force; and, according to the terms of the report, there must be

Judgment for the plaintiff.

SECTION IV.

Duty of Care towards Invited Person; Social Guest, or Person expressly or impliedly Invited on Business.

SOUTHCOTE *v.* STANLEY.

1856. 1 *Hurlstone & Norman*, 247.

THE declaration stated that at the time of the committing of the grievances, &c., the defendant was possessed of an hotel, into which he had then permitted and invited the plaintiff to come as a visitor of the defendant, and in which the plaintiff as such visitor then lawfully was by the permission and invitation of the defendant, and in which hotel there then was a glass door of the defendant which it was then necessary for the plaintiff, as such visitor, to open for the purpose of leaving the hotel, and which the plaintiff, as such visitor, then by the permission of the defendant and with his knowledge, and without any warning from him, lawfully opened for the purpose aforesaid, as a door which was in a proper condition to be opened; nevertheless, by and through the mere carelessness, negligence, and default of the defendant in that behalf, the said door was then in an insecure and dangerous condition, and unfit to be used or opened, and by reason of the said door being in such insecure and dangerous condition and unfit, as aforesaid, and of the then carelessness, negligence, default, and improper conduct of the defendant in that behalf, a large piece of glass from the said door fell out of the same to and upon the plaintiff, and wounded him, and he sustained divers bodily injuries, and remained ill and unable to work for a long time, &c.

Demurrer and joinder therein.

Raymond, in support of the demurrer. The declaration discloses no cause of action. It is not stated that the plaintiff was in the hotel as a guest, but merely as a visitor; and there is no allegation that the defendant knew of the dangerous condition of the door. To render the defendant liable, the declaration ought to have shown some contract between the plaintiff and the defendant which imposed on the latter the obligation of taking care that the door was secure; or it should have alleged some negligence on the part of the defendant in the performance of a duty which he owed to the plaintiff. [BRAMWELL, B. If a person invites another into his house, and the latter can only enter through a particular door, is it not the duty of the former to take care that the door is in a secure condition?] He may not be aware that the door is insecure. This declaration only alleges that through the care-

lessness, negligence, and default of the defendant the door was in a dangerous condition; that cannot be read as involving the allegation that the defendant knew that the door was insecure. All facts necessary to raise a legal liability must be strictly averred. *Metcalfe* v. *Hetherington*, 11 Exch. 257. [ALDERSON, B. It is not stated that it was the duty of the defendant, as an hotel keeper, to take care that the door was secure. Suppose a person invites another to his house, and the latter runs his hand through a pane of glass, how is the former liable?] The Court then called on

Gray, *contra*. The declaration shows a duty on the part of the defendant, and a breach of that duty. It is immaterial whether the injury takes place in a private house, or in a shop, or in a street; the only question is whether the person who complains was lawfully there? The case is similar in principle to that of *Randleson* v. *Murray*, 8 A. & E. 109; E. C. L. R. vol. 35, which decided that a warehouseman who lowers goods from his warehouse is bound to use proper tackle for that purpose. [ALDERSON, B. It is the duty of every person who hangs anything over a public way to take care that it is suspended by a proper rope.] Whether it be a private house or a shop, a duty is so far imposed on the occupier to keep it reasonably secure, that if a person lawfully enters, and through the negligence of the occupier in leaving it in an insecure state receives an injury, the occupier is responsible. Here it is alleged that the defendant invited the plaintiff to come into the hotel as a visitor; that shows that he was lawfully there. [POLLOCK, C. B. The position that an action lies because the plaintiff was lawfully in the house, cannot be supported; a servant is lawfully in his master's house and yet if the balusters fell, whereby he was injured, he could not maintain an action against the master. If a lady who is invited to dinner goes in an expensive dress, and a servant spills something over her dress which spoils it, the master of the house would not be liable. Where a person enters a house by invitation the same rule prevails as in the case of a servant. A visitor would have no right of action for being put in a damp bed, or near a broken pane of glass, whereby he caught cold. ALDERSON, B. The case of a shop is different, because a shop is open to the public; and there is a distinction between persons who come on business and those who come by invitation.]

POLLOCK, C. B. We are all of opinion that the declaration cannot be supported, and that the defendant is entitled to judgment. I do not think it necessary to point out the reasons by which I have come to that conclusion; because it follows from the decision of this Court [1] that the mere relation of master and servant does not create any implied duty on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. That decision has been followed by several cases,[2] and is now established law, though

[1] *Priestly* v. *Fowler*, 3 M. & W. 1.

[2] See *Hutchinson* v. *The Newcastle, York, & Berwick Railway Company*, 5 Exch. 343; *Wiggett* v. *Fox*, 11 Exch. 832.

I believe the principle was not recognized until recent times. The reason for the rule is that the servant undertakes to run all the ordinary risk of service, including those arising from the negligence of his fellow-servants. The rule applies to all the members of a domestic establishment, so that the master is not in general liable to a servant for injury resulting from the negligence of a fellow-servant; neither can one servant maintain an action against another for negligence whilst engaged in their common employment. The same principle applies to the case of a visitor at a house: whilst he remains there he is in the same position as any other member of the establishment, so far as regards the negligence of the master or his servants, and he must take his chance with the rest.

ALDERSON, B. I am of the same opinion.

BRAMWELL, B. I agree with Mr. *Gray* to this extent, that where a person is in the house of another, either on business or for any other purpose, he has a right to expect that the owner of the house will take reasonable care to protect him from injury; for instance, that he will not allow a trap-door to be open through which the visitor may fall. But in this case my difficulty is to see that the declaration charges any act of commission. If a person asked another to walk in his garden, in which he had placed spring-guns or men-traps, and the latter, not being aware of it, was thereby injured, that would be an act of commission. But if a person asked a visitor to sleep at his house, and the former omitted to see that the sheets were properly aired, whereby the visitor caught cold, he could maintain no action, for there was no act of commission, but simply an act of omission. This declaration merely alleges that "by and through the mere carelessness, negligence, default, and improper conduct of the defendant," the glass fell from the door. That means a want of care, — a default in not doing something. The words are all negatives, and under these circumstances the action is not maintainable. I doubted whether the words "carelessness, negligence, and improper conduct," &c., might not mean something equivalent to actual commission, but on the best consideration which I can give the subject, it appears to me that they do not mean that, but merely point to a negative. If I misconstrue the declaration it is the fault of those who so framed it.

Judgment for the defendant.[1]

[1] Whether the result in the above case is correct is a question not yet decided in most of the United States, and upon which conflicting opinions have been expressed. See KNOWLTON, J., in *Coupe* v. *Platt*, 172 Mass. 458, p. 459; Bigelow on Torts, 7th ed., pp. 362, 363, sections 740–743; Burdick on Torts, 2d ed., pp. 457, 458; 2 Shearman & Redfield on Negligence, 4th ed., sect. 706; *Barman* v. *Spencer*, Indiana, 1898, 49 Northeastern Reporter, 9, pp. 11, 12; *Land* v. *Fitzgerald*, 68 New Jersey Law, 28. — ED.

INDERMAUR *v.* DAMES.

1866. *Law Reports*, 1 *Common Pleas*, 274.[1]

The judgment of the Court (Erle, C. J., Willes, Keating, and Montague Smith, JJ.) was delivered by

Willes, J. This was an action to recover damages for hurt sustained by the plaintiff's falling down a shaft at the defendant's place of business, through the actionable negligence, as it was alleged, of the defendant and his servants.

At the trial before the Lord Chief Justice at the sittings here after Michaelmas Term, the plaintiff had a verdict for 400*l.* damages, subject to leave reserved.

A rule was obtained by the defendant in last term to enter a nonsuit, or to arrest the judgment, or for a new trial because of the verdict being against the evidence.

The rule was argued during the last term, before Erle, C. J., Keating and Montague Smith, JJ., and myself, when we took time to consider. We are now of opinion that the rule ought to be discharged.

It appears that the defendant was a sugar-refiner, at whose place of business there was a shaft four feet three inches square, and twenty-nine feet three inches deep, used for moving sugar. The shaft was necessary, usual, and proper in the way of the defendant's business. Whilst it was in use, it was necessary and proper that it should be open and unfenced. When it was not in use, it was sometimes necessary, with reference to ventilation, that it should be open. It was not necessary that it should, when not in use, be unfenced; and it might then without injury to the business have been fenced by a rail. Whether it was usual to fence similar shafts when not in use did not distinctly appear; nor is it very material, because such protection was unquestionably proper, in the sense of reasonable, with reference to the safety of persons having a right to move about upon the floor where the shaft in fact was, because in its nature it formed a pitfall there. At the time of the accident it was not in use, and it was open and unfenced.

The plaintiff was a journeyman gas-fitter in the employ of a patentee who had supplied the defendant with his patent gas-regulator, to be paid for upon the terms that it effected a certain saving: and, for the purpose of ascertaining whether such a saving had been effected, the

[1] Statement and arguments omitted. — Ed.

plaintiff's employer required to test the action of the regulator. He accordingly sent the plaintiff to the defendant's place of business for that purpose; and, whilst the plaintiff was engaged upon the floor where the shaft was, he (under circumstances as to which the evidence was conflicting, but) accidentally, and, as the jury found, without any fault or negligence on his part, fell down the shaft, and was seriously hurt.

It was argued, that, as the defendant had objected to the plaintiff's working at the place upon a former occasion, he (the plaintiff) could not be considered as having been in the place with the defendant's leave at the time of the accident: but the evidence did not establish a peremptory or absolute objection to the plaintiff's being employed, so as to make the sending of him upon the occasion of the accident any more against the defendant's will than the sending of any other workman: and the employment, and the implied authority resulting therefrom to test the apparatus were not of a character involving personal preference (*dilectus personæ*), so as to make it necessary that the patentee should himself attend. It was not suggested that the work was not journeyman's work.

It was also argued that the plaintiff was at best in the condition of a bare licensee or guest who, it was urged, is only entitled to use the place as he finds it, and whose complaint may be said to wear the color of ingratitude, so long as there is no design to injure him: see *Hounsell* v. *Smyth*, 7 C. B. N. S. 371 (E. C. L. R. vol. 97), 29 L. J. (C. P.) 203.

We think this argument fails, because the capacity in which the plaintiff was there was that of a person on lawful business, in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest, and not upon bare permission. No sound distinction was suggested between the case of the servant and the case of the employer, if the latter had thought proper to go in person; nor between the case of a person engaged in doing the work for the defendant pursuant to his employment, and that of a person testing the work which he had stipulated with the defendant to be paid for if it stood the test; whereby impliedly the workman was to be allowed an onstand to apply that test, and a reasonable opportunity of doing so. Any duty to enable the workman to do the work in safety, seems equally to exist during the accessory employment of testing: and any duty to provide for the safety of the master workman, seems equally owing to the servant workman whom he may lawfully send in his place.

It is observable, that, in the case of *Southcote* v. *Stanley*, 1 H. & N. 247, 25 L. J. (Ex.) 339, upon which much reliance was properly placed for the defendant, Alderson, B., drew the distinction between a bare licensee and a person coming on business, and Bramwell, B., between active negligence in respect of unusual danger known to the host and not to the guest, and a bare defect of construction or repair, which the host was only negligent in not finding out or anticipating the consequence of.

There is considerable resemblance, though not a strict analogy, be-

tween this class of cases and those founded upon the rule as to voluntary loans and gifts, that there is no remedy against the lender or giver for damage sustained from the loan or gift, except in case of unusual danger known to and concealed by the lender or giver. *Macarthy* v. *Younge*, 6 H. & N. 329, 30 L. J. (Ex.) 227. The case of the carboy of vitriol[1] was one in which this Court held answerable the bailor of an unusually dangerous chattel, the quality of which he knew, but did not tell the bailee, who did not know it, and, who as a proximate consequence of his not knowing, and without any fault on his part, suffered damage.

The cases referred to as to the liability for accidents to servants and persons employed in other capacities in a business or profession which necessarily and obviously exposes them to danger, as in *Seymour* v. *Maddox*, 16 Q. B. 326 (E. C. L. R. vol. 71), also have their special reasons. The servant or other person so employed is supposed to undertake not only all the ordinary risks of the employment into which he enters, but also all extraordinary risks which he knows of and thinks proper to incur, including those caused by the misconduct of his fellow-servants, not however including those which can be traced to mere breach of duty on the part of the master. In the case of a statutory duty to fence, even the knowledge and reluctant submission of the servant who has sustained an injury, are held to be only elements in determining whether there has been contributory negligence: how far this is the law between master and servant, where there is danger known to the servant, and no statute for his protection, we need not now consider, because the plaintiff in this case was not a servant of the defendant, but the servant of the patentee. The question was adverted to, but not decided, in *Clarke* v. *Holmes*, 7 H. & N. 937, 31 L. J. (Ex.) 356.[2]

The authorities respecting guests and other bare licensees, and those respecting servants and others who consent to incur a risk, being therefore inapplicable, we are to consider what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation, express or implied. The common case is that of a customer in a shop: but it is obvious that this is only one of a class; for, whether the customer is actually chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know, such as a trap-door left open, unfenced, and unlighted: *Lancaster Canal Company* v. *Parnaby*, 11 Ad. & E. 223 (E. C. L. R. vol. 39), 3 P. & D. 162; *per cur. Chapman* v. *Rothwell*, E. B. & E. 168 (E. C. L. R. vol. 96), 27 L. J. (Q. B.) 315, where *Southcote* v. *Stanley*, 1 H. & N. 247, 25 L. J. (Ex.) 339, was cited, and the Lord Chief Justice, then Erle, J., said: "The distinc-

[1] *Farrant* v. *Barnes*, 11 C. B. N. S. 553 (E. C. L. R. vol. 103); 31 L. J. (C. P.) 137.

[2] And see *Bolch* v. *Smith*, 7 H. & N. 736; 31 L. J. (Ex.) 201.

tion is between the case of a visitor (as the plaintiff was in *Southcote* v. *Stanley*), who must take care of himself, and a customer, who, as one of the public, is invited for the purposes of business carried on by the defendant." This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself. And, if a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during this accessory visit, though it might not be for the shopkeeper's benefit, as during the principal visit, which was. And if, instead of going himself, the customer were to send his servant, the servant would be entitled to the same consideration as the master.

The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied.

And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.

In the case of *Wilkinson* v. *Fairrie*, 1 H. & C. 633, 32 L. J. (Ex.) 73, relied upon for the defendant, the distinction was pointed out between ordinary accidents, such as falling down stairs, which ought to be imputed to the carelessness or misfortune of the sufferer, and accidents from unusual, covert danger, such as that of falling down into a pit.

It was ably insisted for the defendant that he could only be bound to keep his place of business in the same condition as other places of business of the like kind, according to the best known mode of construction. And this argument seems conclusive to prove that there was no absolute duty to prevent danger, but only a duty to make the place as little dangerous as such a place could reasonably be, having regard to the contrivances necessarily used in carrying on the business. But we think the argument is inapplicable to the facts of this case; first, because it was not shown, and probably could not be, that there was any usage never to fence shafts; secondly, because it was proved, that, when the shaft was not in use, a fence might be resorted to without inconvenience; and no usage could establish that what was in fact

unnecessarily dangerous was in law reasonably safe, as against persons towards whom there was a duty to be careful.

Having fully considered the notes of the Lord Chief Justice, we think there was evidence for the jury that the plaintiff was in the place by the tacit invitation of the defendant, upon business in which he was concerned; that there was by reason of the shaft unusual danger known to the defendant; and that the plaintiff sustained damage by reason of that danger, and of the neglect of the defendant and his servants to use reasonably sufficient means to avert or warn him of it: and we cannot say that the proof of contributory negligence was so clear that we ought on this ground to set aside the verdict of the jury.

As for the argument that the plaintiff contributed to the accident by not following his guide, the answer may be that the guide, knowing the place, ought rather to have waited for him; and this point, as matter of fact, is set at rest by the verdict.

For these reasons, we think there was evidence of a cause of action in respect of which the jury were properly directed; and, as every reservation of leave to enter a nonsuit carries with it an implied condition that the Court may amend, if necessary, in such a manner as to raise the real question, leave ought to be given to the plaintiff, in the event of the defendant desiring to appeal or to bring a writ of error, to amend the declaration by stating the facts as proved, — in effect, that the defendant was the occupier of and carried on business at the place; that there was a shaft, very dangerous to persons in the place, which the defendant knew and the plaintiff did not know; that the plaintiff, by invitation and permission of the defendant, was near the shaft, upon business of the defendant, in the way of his own craft as a gas-fitter, for hire, &c., stating the circumstances, the negligence, and that by reason thereof the plaintiff was injured. The details of the amendment can, if necessary, be settled at chambers.

As to the motion to arrest the judgment, for the reasons already given, and upon condition that an amendment is to be made if and when required by the defendant, it will follow the fate of the motion to enter a nonsuit.

The other arguments for the defendant, to which we have not particularly adverted, were no more than objections to the verdict as being against the evidence: but it would be wrong to grant a new trial without a reasonable expectation that another jury might take a different view of the facts; and, as the Lord Chief Justice does not express any dissatisfaction with the verdict, the rule upon this, the only remaining ground, must also be discharged.

Rule discharged.

Affirmed in Exchequer Chamber, L. R. 2 C. P. 311.

BURK *v.* WALSH.

1902. 118 *Iowa*, 397.[1]

ACTION to recover for hurt sustained by plaintiff's falling into an unprotected elevator shaft, while plaintiff was in defendants' store as a customer for the purpose of purchasing goods. In the District Court there was a verdict and judgment for plaintiff. Defendant appealed.

Boies & Boies, for appellant.

Mullan & Pickett, for appellee.

McCLAIN, J. [After holding that an instruction upon another point was erroneous.]

In another instruction the court told the jury that, if plaintiff entered defendants' store through the rear door by express or implied invitation, and the elevator hatchway was in such proximity to that door, and so located, that persons entering the store through that door were liable to step or fall into it, "then the law imposes upon the defendants the obligation to protect such open hatchway upon the side thereof towards such door," and that "a failure on the part of defendants to erect and maintain guards or barriers to protect persons entering such storeroom through such rear door from stepping or falling into such hatchway makes them guilty of negligence." The court, by such instruction, assumed to say that under no circumstances would the defendants be free from negligence with reference to the maintaining of the hatchway unless they erected guards or barriers. We hardly think it competent to thus specifically define the protection which defendants owed to a person on their premises in the exercise of ordinary care. For instance, if it were inconvenient, in the use of the elevator for proper purposes, to maintain a barrier or barricade, but a watchman was stationed outside the open hatchway to warn all persons approaching of the danger, this would, no doubt, be sufficient. Possibly, in view of what was said in other instructions as to the duty of defendants, the jury were not misled by this instruction in applying the law to the evidence but, as an abstract proposition, it is not a correct statement of the general rule of law.

For the errors pointed out in the instructions to the jury, the judgment is *Reversed.*

[1] Only so much of the case is given as relates to a single question. — ED.

GARFIELD, &c., COAL CO. *v.* ROCKLAND, &c., LIME CO.

1903. 184 *Massachusetts*, 60.[1]

TORT, by the owner of the coal barge Western Belle, for injury to that vessel by grounding on a ledge of rock embedded in the mud at the bottom of the defendant's dock at Rockland, Maine.

In the Superior Court the case was tried by a judge without a jury.

"It appeared at the trial that defendant was part owner of a dock, and used it for the discharge of cargoes of coal consigned to it. Plaintiff had sold coal to the defendant, and sent it a barge loaded therewith." [2]

The plaintiff requested the judge to make certain rulings, including the following: —

"4. It is not necessary for the plaintiff to show that the defendant knew of the ledge; it is sufficient if its existence could have been discovered by reasonable diligence."

The judge refused to make any of the rulings, and found for the defendant. The plaintiff excepted.

H. Wheeler, for plaintiff.
R. M. Saltonstall, for defendant.

LATHROP, J. . . . The general rules of law which are applicable in cases of this character are the same in England and in this country, and are the same at common law and in admiralty. They are as well stated in the case of *Nickerson* v. *Tirrell*, 127 Mass. 236, 239, as perhaps in any case: "The owner or occupant of a dock is liable in damages to a person who, by his invitation express or implied, makes use of it, for an injury caused by any defect or unsafe condition of the dock which the occupant negligently causes or permits to exist, if such person was himself in the exercise of due care. Such occupant is not an insurer of the safety of his dock, but he is required to use reasonable care to keep his dock in such a state as to be reasonably safe for use by vessels which he invites to enter it, or for which he holds it out as fit and ready. If he fails to use such due care, if there is a defect which is known to him, or which by the use of ordinary care and diligence should be known to him, he is guilty of negligence and liable to the person who, using due care, is injured thereby. *Wendell* v. *Baxter*, 12 Gray, 494; *Carleton* v. *Franconia Iron & Steel Co.*, 99 Mass. 216; *Thompson* v. *Northeastern Railway*, 2 B. & S. 106;

[1] Statement rewritten. Only so much of the case is given as relates to a single point. — ED.

[2] The passage in quotation marks is taken from the report of this case in 67 Northeastern Reporter, 863. — ED.

Mersey Docks v. *Gibbs*, L. R. 1 H. L. 93." Other cases bearing upon this point are: *Smith* v. *Burnett*, 173 U. S. 430; *Barber* v. *Abendroth*, 102 N. Y. 406; *Barrett* v. *Black*, 56 Maine, 498; *Sawyer* v. *Oakman*, 1 Lowell, 134, s. c. 7 Blatchf. 290; *The John A. Berkman*, 6 Fed. Rep. 535; *Pennsylvania Railroad* v. *Atha*, 22 Fed. Rep. 920; *Smith* v. *Havemeyer*, 36 Fed. Rep. 927; *Manhattan Transportation Co.* v. *Mayor*, 37 Fed. Rep. 160; *Union Ice Co.* v. *Crowell*, 55 Fed. Rep. 87. The rule is the same in England. *Gibbs* v. *Liverpool Docks*, 3 H. & N. 164; s. c. *nom. Mersey Docks* v. *Gibbs*, 11 H. L. Cas. 686, and L. R. 1 H. L. 93; *The Moorcock*, 13 P. D. 157, and 14 P. D. 64.

. . . . . .

It is clear that the vessel was in the defendant's dock on business, and was, therefore, there by invitation. The judge has found, and the evidence shows, that the injury was caused by a ledge of rocks embedded in the mud at the bottom of the dock. The questions of fact which he did not pass upon are whether the master was in the exercise of due care, and whether the defendant knew of the defect or could by the exercise of reasonable care and diligence have ascertained its existence.

. . . . . .

The fourth request should have been given. See cases cited above.

Exceptions sustained.

INDIANAPOLIS STREET RAILWAY COMPANY *v.* DAWSON.

1903. 31 *Indiana Appellate Court*, 605.

From Superior Court of Marion County; *Vincent G. Clifford*, Special Judge.

Action by George J. Dawson against the Indianapolis Street Railway Company. From a judgment for plaintiff, defendant appeals.

F. Winter, *C. Winter* and *W. H. Latta*, for appellant.

I. D. Blair and *O. V. Royall*, for appellee.

Roby, J. Action by appellee. Verdict and judgment for $500. Demurrers to first and second paragraphs of complaint overruled. Motion for a new trial overruled.

It is averred in the first paragraph of complaint, in substance, as extracted from a multitude of words, that appellant was on August 25, 1901, a corporation operating a street railway system in Indianapolis and was a common carrier for hire; that it owned a park near said city, and maintained certain attractions therein to induce persons to ride on its cars, inviting them to said park; that on the day named it gave a free band concert therein, the same having been

extensively advertised prior thereto; that on said day appellee, accompanied by a lady, took passage upon one of its regular cars, and was conveyed to said park; that a large number of persons were daily transported thereto, among them a large number of lawless persons who were hostile to colored people, of whom appellee was one, their names being unknown to plaintiff, and who had long before said day entered into a conspiracy "to suppress, molest, assault, and insult colored people generally who might visit said park"; that in pursuance of such conspiracy said persons assaulted and beat appellee, and drove him from the park; that he and his companion demeaned themselves in a ladylike and gentlemanly manner, but upon arriving at the park were set upon by a large number of white boys and young men, appellee being assaulted and beaten by them; that appellant had, and had had for a long time prior to said day, full notice and knowledge of said conditions, and of the unlawful purposes aforesaid, and of acts of violence committed thereunder, but took no steps to prevent such conduct; that early in the afternoon of said day said lawless men and boys began marching and drilling openly in said park preparatory to an attack upon any colored male person who should be found there later, appellant taking no steps to prevent such conduct or to notify colored people of the danger, although it had knowledge thereof; that neither appellant nor its officers made any objection to the open and notorious gathering of white men and boys for the unlawful purpose stated; that it was negligent and indifferent in not employing and using a sufficient number of guards and policemen to maintain the peace; that two of its guards or policemen aided and abetted the wrong done appellee by standing by when he was being unmercifully beaten by said crowd of lawless white men and boys, and offering him no assistance, although they were able to do so, and could have prevented injury to him. "Wherefore, by reason of the matters therein stated, the plaintiff has been damaged," etc. The second paragraph of complaint is somewhat more extended than the first one, but for the purpose of this opinion the statement made is sufficient.

The pleading charges appellant with notice of the alleged conspiracy, with acquiescence therein, and, by its guards or policemen, with passive participation in the actual assault made upon appellee. "When one expressly or by implication invites others to come upon his premises, whether for business or any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the place reasonably safe for the visit." Cooley, Torts (2d ed.), 718; *Howe* v. *Ohmart*, 7 Ind. App. 32, 38; *Richmond, etc., R. Co.* v. *Moore*, 94 Va. 493, 37 L. R. A. 258; *North Manchester, etc., Assn.* v. *Wilcox*, 4 Ind. App. 141; *Penso* v. *McCormick*, 125 Ind. 116, 21 Am. St. 211.

No case has been cited or found where the premises upon which the injury complained of occurred, and to which the complainant came by

invitation, were made unsafe through a conspiracy of the nature set up herein. Danger usually has been attributed to some defect in the premises themselves. But as a matter of principle it is quite as reprehensible to invite one knowing an enemy is awaiting him with the intent to assault and beat him as it would be to invite him without having made the floor or the stairway secure. One attending an agricultural fair in response to a general invitation extended to the public has been awarded damages against the association where his horse was killed by target shooting upon a part of the ground allowed for such purpose. *Conradt* v. *Clauve*, 93 Ind. 476, 47 Am. Rep. 388.

Recoveries have also been sustained: When spectators rushed upon a race-track, causing a collision between horses being driven thereon. *North Manchester, etc., Assn.* v. *Wilcox*, 4 Ind. App. 141. When an opening was left in a fence surrounding a race-track, through which one of the horses, running, went among the spectators. *Windeler* v. *Rush County Fair Assn.*, 27 Ind. App. 92. Where horses were started on a race-track in opposite directions at the same time, causing collision. *Fairmount, etc., Assn.* v. *Downey*, 146 Ind. 503. Where a horse with a vicious habit of track bolting was permitted to run in a race, such horse bolting the track, causing injury. *Lane* v. *Minnesota, etc., Soc.*, 62 Minn. 175, 29 L. R. A. 708. Recognizing the rule of reasonable care to make the premises safe, a recovery was denied in the absence of any evidence of the immediate cause of a horse running through the crowds. *Hart* v. *Washington Park Club*, 157 Ill. 9, 29 L. R. A. 492. Where a street car company maintained a park as a place of attraction for passengers over its line, the falling of a pole used by one making a balloon ascension, under a contract, injuring a bystander, recovery was allowed, the rule being announced that the company must use proper care to protect its patrons from danger while on its grounds. *Richmond, etc., R. Co.* v. *Moore*, 94 Va. 493, 37 L. R. A. 258. Where a street car company maintained a large stage for exhibitions, in a pleasure resort owned by it, and made a written contract with a manager, by which the latter furnished various entertainments, among which was target shooting, one injured by a split bullet was allowed to recover, it being held that he might safely rely on those who provided the exhibition and invited his attendance to take due care to make the place safe from such injury as he received, the question of due care being one for the jury. *Thompson* v. *Lowell, etc., St. R. Co.*, 170 Mass. 577, 40 L. R. A. 345; *Curtis* v. *Kiley*, 153 Mass. 123.

The duty of common carriers to protect their passengers from injury on account of unlawful violence by persons not connected with their service has frequently furnished material for judicial consideration. The New Jersey court of errors and appeals approved an exhaustive and carefully considered opinion delivered by the Supreme Court of that State to the effect that a passenger who, while attempting to have her baggage checked, was knocked down and injured by

cabmen, in no sense servants of the carrier, scuffling on a passage-way under its control, might recover against it. *Exton* v. *Central R. Co.*, 63 N. J. L. 356, 56 L. R. A. 508. In what seems to have been a pioneer case, it was held by the Supreme Court of Pennsylvania in 1866, that it was the duty of the trainmen on a passenger-train to exert the forces at their disposal to prevent injury to passengers by others fighting in the car. *Pittsburgh, etc., R. Co.* v. *Hinds*, 53 Pa. St. 512. Ten years later the Supreme Court of Mississippi, after very exhaustive arguments by eminent counsel of national reputation, reached the same conclusion. *New Orleans, etc., R. Co.* v. *Burke*, 53 Miss. 200.

Without further elaboration it may safely be said that the unusual character of an alleged peril, from which it is averred the appellant did not use due care to protect its visitors, does not affect the right of recovery, it being otherwise justified. The demurrers were therefore correctly overruled.

Evidence was introduced of other prior assaults at said park upon colored persons, and articles previously published by daily newspapers in the city describing such occurrences were also admitted. In order to determine whether appellant used due care, it was essential to show its knowledge or means of information relative to the conditions alleged to exist, rendering it dangerous for appellee to visit the park. The evidence of similar occurrences was competent as tending to show notice of the conditions. *Toledo, etc., R. Co.* v. *Milligan*, 2 Ind. App. 578; *City of Delphi* v. *Lowery*, 74 Ind. 520, 39 Am. Rep. 98; *City of Goshen* v. *England*, 119 Ind. 368, 375.

The facts upon which appellant's liability depends otherwise than heretofore considered were questions for the determination of the jury. There was evidence tending to establish, and from which the jury might properly find, the existence of such facts.

Appellant and its officers appear to have displayed indifference to the conditions existing which it and they could not well help knowing. This may have been due to the idea, sometimes entertained, that as to acts of lawlessness it is a sufficient duty of citizenship to be indifferent. Such idea is entirely erroneous.

Judgment affirmed.

GANLEY *v.* HALL.

1897. 168 *Massachusetts*, 513.

TORT, for personal injuries occasioned to the plaintiff by falling on an artificial formation of ice caused by the dripping of water from defective gutters and conductors on a flight of stairs used in common by the tenants of the defendant. Trial in the Superior Court,

before Hammond, J., who ruled that the plaintiff was a mere licensee, and directed a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

J. F. Cronan, for the plaintiff.

C. C. Smith, for the defendant.

LATHROP, J. In this case the plaintiff went to the tenement owned by the defendant purely on his own business, and not on any business in which his brother, the tenant whom he went to see, was engaged. He wished to borrow money, but the exceptions state that it did not appear that the plaintiff's brother ever held himself out as lending money, or that he ever lent money before. There was no previous appointment to call, and no previous notice of his intention to call had been given. The judge, therefore, rightly ruled that the plaintiff was a mere licensee, and that the defendant on the evidence was not liable. See *Plummer* v. *Dill*, 156 Mass. 426; *Hart* v. *Cole*, 156 Mass. 475.

The case at bar differs from *Wilcox* v. *Zane*, 167 Mass. 302, where the plaintiff was an agent or servant of one of the tenants, and was held to have the same rights as the tenant had.

Exceptions overruled.

SWEENY *v.* OLD COLONY, &c. RAILROAD COMPANY.

1865. 10 *Allen* (*Massachusetts*), 368.

TORT to recover damages for a personal injury sustained by being run over by the defendants' cars, while the plaintiff was crossing their railroad by license, on a private way leading from South Street to Federal Street, in Boston.

At the trial in this Court, before Chapman, J., it appeared that this private-way, which is called Lehigh Street, was made by the South Cove Corporation for their own benefit, and that they own the fee of it; that it is wrought as a way, and buildings are erected on each side of it, belonging to the owners of the way, and there has been much crossing there by the public for several years. The defendants, having rightfully taken the land under their charter, not subject to any right of way, made a convenient plank-crossing and kept a flagman at the end of it on South Street, partly to protect their own property, and partly to protect the public. They have never made any objection to such crossing, so far as it did not interfere with their cars and engines. There are several tracks at the crossing. The only right of the public to use the crossing is under the license implied by the facts stated above.

On the day of the accident, the defendants had a car at their depot which they had occasion to run over to their car-house. It was attached to an engine and taken over the crossing, and to a proper distance beyond the switch. The coupling-pin was then taken out, the engine reversed, and it was moved towards the car-house by the side track. The engine was provided with a good engineer and fireman, and the car with a brakeman; the bell was constantly rung, and the defendants were not guilty of any negligence in respect to the management of the car or engine.

As the engine and car were coming from the depot, the plaintiff, with a horse and a wagon loaded with empty beer-barrels, was coming down South Street from the same direction. There was evidence tending to show that, as he approached the crossing, the flagman, who was at his post, made a signal to him with his flag to stop, which he did; that, in answer to an inquiry by the plaintiff whether he could then cross, he then made another signal with his flag, indicating that it was safe to cross; that the plaintiff started and attempted to cross, looking straight forward; that he saw the car coming near him as it went towards the car-house; and that he jumped forward from his wagon, and the car knocked him down and ran over him and broke both his legs. It struck the fore-wheel of his wagon and also his horse. If he had remained in his wagon, or had not jumped forwards, or had kept about the middle of the crossing, the evidence showed that he would not have been injured personally. His wagon was near the left-hand side of the plank-crossing as he went.

The defendants contended that, even if the plaintiff used ordinary care, and if the flagman carelessly and negligently gave the signal that he might cross, when in fact it was unsafe to do so on account of the approaching car, the plaintiff was not entitled to recover, because the license to people to use the crossing was not a license to use it at the risk of the defendants, but to use it as they best could when not forbidden, taking care of their own safety, and going at their own risk; and also, that if the flagman made a signal to the plaintiff that he might cross, he exceeded his authority.

But the evidence being very contradictory as to the care used by the plaintiff, and also as to the care used by the flagman, the judge ruled, for the purpose of taking a verdict upon these two facts, that the defendants had a right to use the crossing as they did on this occasion, and that they were not bound to keep a flagman there; yet, since they did habitually keep one there, they would be responsible to the plaintiff for the injury done to him by the car, provided he used due care, if he was induced to cross by the signal made to him by the flagman, and if that signal was carelessly or negligently made at a time when it was unsafe to cross on account of the movement of the car.

The jury returned a verdict for the plaintiff for $7500; and the case was reserved for the consideration of the whole Court.

J. G. Abbott and *P. H. Sears*, for the defendants. The defendants

had, for all purposes incident to the complete enjoyment of their franchise, the right of exclusive possession and use of the place where the accident happened, against the owners of the fee, and still more against all other persons. *Hazen* v. *Boston & Maine Railroad*, 2 Gray, 574; *Brainard* v. *Clapp*, 10 Cush. 6; Gen. Stat. c. 63, §§ 102, 103. The defendants were not bound to keep a flagman there, or exercise the other precautions prescribed for the crossing of highways or travelled places. Gen. Sts. c. 63, §§ 64–66, 83–91; *Boston & Worcester Railroad* v. *Old Colony Railroad*, 12 Cush. 608. The license or permission, if any, to the plaintiff to pass over the premises did not impose any duty on the defendants, but he took the permission, with its concomitant perils, at his own risk. *Howland* v. *Vincent*, 10 Met. 371, 374; *Scott* v. *London Docks Co.*, 11 Law Times (N. S.), 383; *Chapman* v. *Rothwell*, El. Bl. & El. 168; *Southcote* v. *Stanley*, 1 Hurlst. & Norm. 247; *Hounsell* v. *Smyth*, 7 C. B. (N. S.) 729, 735, 742; *Binks* v. *South Yorkshire Railway, &c.*, 32 Law Journ. (N. S.) Q. B. 26; *Blithe* v. *Topham*, 1 Rol. Ab. 88; s. c. 1 Vin. Ab. 555, pl. 4; Cro. Jac. 158. The defendants did not hold out to the plaintiff an invitation to pass over. *Hounsell* v. *Smyth* and *Binks* v. *South Yorkshire Railway*, above cited. The allowing or making of such private crossing was not in itself such an invitation, and did not involve the duty of such precautions. The keeping of a flagman there was wholly for the purpose of preventing persons from crossing, not for the purpose of holding out invitations at any time. The signal that the plaintiff might cross was in answer to his inquiry, and was, at most, only revoking the prohibition, or granting permission; it was not holding out an invitation. The duty of the flagman was simply to warn persons against crossing; and if the flagman held out an invitation or even gave permission to the plaintiff to cross, he went beyond the scope of his employment, and the defendants are not liable on account thereof. *Lygo* v. *Newbold*, 9 Exch. 302; *Middleton* v. *Fowle*, 1 Salk. 282. Even if the defendants had carelessly held out an invitation to the plaintiff to cross, still they would not be liable; for the report shows that after such supposed invitation the plaintiff might, by the exercise of ordinary care, have avoided the injury; that the plaintiff was himself at the time in the wrong; and that his own negligence and fault contributed to the accident. *Todd* v. *Old Colony & Fall River Railroad*, 7 Allen, 207; s. c. 3 Allen, 18, and cases cited; *Denny* v. *Williams*, 5 Allen, 1, and cases cited; *Spofford* v. *Harlow*, 3 Allen, 177, and cases cited.

S. J. Thomas, for the plaintiff.

BIGELOW, C. J. This case has been presented with great care on the part of the learned counsel for the defendants, who have produced before us all the leading authorities bearing on the question of law which was reserved at the trial. We have not found it easy to decide on which side of the line which marks the limit of the defendant's liability for damages caused by the acts of their agents, the case at bar

falls. But on careful consideration we have been brought to the conclusion that the rulings at the trial were right, and that we cannot set aside the verdict for the plaintiff on the ground that it was based on erroneous instructions in matter of law.

In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff, which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests. There can be no fault, or negligence, or breach of duty, where there is no act, or service, or contract, which a party is bound to perform or fulfil. All the cases in the books, in which a party is sought to be charged on the ground that he has caused a way or other place to be incumbered or suffered it to be in a dangerous condition, whereby accident and injury have been occasioned to another, turn on the principle that negligence consists in doing or omitting to do an act by which a legal duty or obligation has been violated. Thus a trespasser who comes on the land of another without right cannot maintain an action, if he runs against a barrier or falls into an excavation there situated. The owner of the land is not bound to protect or provide safeguards for wrong-doers. So a licensee, who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pit-falls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter or induced to come upon them by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the place for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon.

On the other hand, there are cases where houses or lands are so situated, or their mode of occupation and use is such, that the owner or occupant is not absolved from all care for the safety of those who come on the premises, but where the law imposes on him an obligation or duty to provide for their security against accident and injury. Thus the keeper of a shop or store is bound to provide means of safe ingress and egress to and from his premises for those having occasion to enter thereon, and is liable in damages for any injury which may happen by reason of any negligence in the mode of constructing or managing the place of entrance and exit. So the keeper of an inn or other place of public resort would be liable to an action in favor of a person who suffered an injury in consequence of an obstruction or defect in the way or passage which was held out and used as the common and proper place of access to the premises. The general rule or principle applicable to this class of cases is, that an owner or occupant is bound to keep

his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurement, or inducement, either express or implied, by which they have been led to enter thereon. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner or person in possession to provide against the danger of accident. The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used. The true distinction is this: A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby.

This distinction is fully recognized in the most recent and best considered cases in the English Courts, and may be deemed to be the pivot on which all cases like the one at bar are made to turn. In *Corby* v. *Hill*, 4 C. B. (N. S.) 556, the owner of land, having a private road for the use of persons coming to his house, gave permission to a builder engaged in erecting a house on the land to place materials on the road; the plaintiff, having occasion to use the road for the purpose of going to the owner's residence, ran against the materials and sustained damage, for which the owner was held liable. Cockburn, C. J., says: "The proprietors of the soil held out an allurement whereby the plaintiff was induced to come on the place in question; they held this road out to all persons having occasion to proceed to the house as the means of access thereto." In *Chapman* v. *Rothwell*, El. Bl. & El. 168, the proprietor of a brewery was held liable in damages for injury and loss of life caused by permitting a trap-door to be open without sufficient light or proper safeguards, in a passage-way through which access was had from the street to his office. This decision was put on the ground that the defendant, by holding out the passage-way as the proper mode of approach to his office and brewery, invited the party injured to go there, and was bound to use due care in providing for his safety. This is the point on which the decision turned, as stated by Keating, J., in *Hounsell* v. *Smyth*, 7 C. B. (N. S.) 738. In the last named case the distinction is clearly drawn between the liability of a person who holds out an inducement or invitation to others to enter on his premises by preparing a way or path by means of which they can gain access to his house or store, or pass into or over the land, and in a case where nothing is

shown but a bare license or permission tacitly given to go upon or through an estate, and the responsibility of finding a safe and secure passage is thrown on the passenger and not on the owner. The same distinction is stated in *Barnes* v. *Ward*, 9 C. B. 392; *Hardcastle* v. *South Yorkshire Railway*, &c., 4 Hurlst. & Norm. 67; and *Binks* v. *South Yorkshire Railway*, &c., 32 Law Journ. (N. S.) Q. B. 26. In the last cited case the language of Blackburn, J., is peculiarly applicable to the case at bar. He says, "There might be a case where permission to use land as a path may amount to such an inducement as to lead the persons using it to suppose it a highway, and thus induce them to use it as such." See also, for a clear statement of the difference between cases where an invitation or allurement is held out by the defendant, and those where nothing appears but a mere license or permission to enter on premises, *Balch* v. *Smith*, 7 Hurlst. & Norm. 741, and *Scott* v. *London Docks Co.*, 11 Law Times (N. S.), 383.

The facts disclosed at the trial of the case now before us, carefully weighed and considered, bring it within that class in which parties have been held liable in damages by reason of having held out an invitation or inducement to persons to enter upon and pass over their premises. It cannot in any just view of the evidence be said that the defendants were passive only, and gave merely a tacit license or assent to the use of the place in question as a public crossing. On the contrary, the place or crossing was situated between two streets of the city (which are much frequented thoroughfares), and was used by great numbers of people who had occasion to pass from one street to the other, and it was fitted and prepared by the defendants with a convenient plank crossing, such as is usually constructed in highways, where they are crossed by the tracks of a railroad, in order to facilitate the passage of animals and vehicles over the rails. It had been so maintained by the defendants for a number of years. These facts would seem to bring the case within the principle already stated, that the license to use the crossing had been used and enjoyed under such circumstances as to amount to an inducement, held out by the defendants to persons having occasion to pass, to believe that it was a highway, and to use it as such. But the case does not rest on these facts only. The defendants had not only constructed and fitted the crossing in the same manner as if it had been a highway, but they had employed a person to stand there with a flag, and to warn persons who were about to pass over the railroad when it was safe for them to attempt to cross with their vehicles and animals, without interference or collision with the engines and cars of the defendants. And it was also shown that when the plaintiff started to go over the tracks with his wagon, it was in obedience to a signal from this agent of the defendants that there was no obstruction or hindrance to his safe passage over the railroad. These facts well warranted the jury in finding, as they must have done in rendering a verdict for the plaintiff under the instructions of the Court, that the defendants induced the plaintiff to cross at the time when he at-

tempted to do so, and met with the injury for which he now seeks compensation.

It was suggested that the person employed by the defendants to stand near the crossing with a flag exceeded his authority in giving a signal to the plaintiff that it was safe for him to pass over the crossing just previously to the accident, and that no such act was within the scope of his employment, which was limited to the duty of preventing persons from passing at times when it was dangerous to do so. But it seems to us that this is a refinement and distinction which the facts do not justify. It is stated in the report that the flagman was stationed at the place in question, charged among other things with the duty of protecting the public. This general statement of the object for which the agent was employed, taken in connection with the fact that he was stationed at a place constructed and used as a public way by great numbers of people, clearly included the duty of indicating to persons when it was safe for them to pass, as well as when it was prudent or necessary for them to refrain from passing.

Nor do we think it can be justly said that the flagman in fact held out no inducement to the plaintiff to pass. No express invitation need have been shown. It would have been only necessary for the plaintiff to prove that the agent did some act to indicate that there was no risk of accident in attempting to pass over the crossing. The evidence at the trial was clearly sufficient to show that the agent of the defendants induced the plaintiff to pass, and that he acted in so doing within the scope of the authority conferred on him. The question whether the plaintiff was so induced was distinctly submitted to the jury by the Court; nor do we see any reason for supposing that the instructions on this point were misunderstood or misapplied by the jury. If they lacked fulness, the defendants should have asked for more explicit instructions. Certainly the evidence as reported well warranted the finding of the jury on this point.

It was also urged that, if the defendants were held liable in this action, they would be made to suffer by reason of the fact that they had taken precautions to guard against accident at the place in question, which they were not bound to use, and that the case would present the singular aspect of holding a party liable for neglect in the performance of a duty voluntarily assumed, and which was not imposed by the rules of law. But this is by no means an anomaly. If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such manner that those who rightfully are led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of his negligence. The liability in such cases does not depend on the motives or considerations which induced a party to take on himself a particular task or duty, but on the question whether the legal rights of others have been violated by the mode in which the charge assumed has been performed.

The Court were not requested at the trial to withdraw the case from the jury on the ground that the plaintiff had failed to show he was in the exercise of due care at the time the accident happened. Upon the evidence, as stated in the report, we cannot say, as matter of law, that the plaintiff did not establish this part of his case.

Judgment on the verdict.

After the above decision was rendered, the verdict was set aside, by CHAPMAN, J., as against the evidence.[1]

KNOWLTON, J., IN PLUMMER *v.* DILL.

1892. 156 *Massachusetts*, 426, p. 430.

There is a class of cases, to which *Sweeny* v. *Railroad Co.*, *ubi supra*, and *Holmes* v. *Drew*, 151 Mass. 578, 25 N. E. Rep. 22, belong, which stand on a ground peculiar to themselves. They are where the defendant, by his conduct, has induced the public to use a way in the belief that it is a street or public way which all have a right to use, and where they suppose they will be safe. The inducement or implied invitation in these cases is not to come to a place of business fitted up by the defendant for traffic to which those only are invited who will come to do business with the occupant, nor is it to come by permission or favor or license; but it is to come as one of the public, and enjoy a public right, in the enjoyment of which one may expect to be protected. The liability of such a case should be co-extensive with the inducement or implied invitation. Decisions of the same kind have been made in New York and New Jersey, which are clearly distinguishable — and which have been distinguished on, perhaps, not very satisfactory grounds — from implied invitations growing out of the preparation of one's place of business for use by his patrons. *Barry* v. *Railroad Co.*, 92 N. Y. 289; *Vanderbeck* v. *Hendry*, 34 N. J. Law, 467, 471.

[1] This case is often cited as though it decided that the defendant was liable to the plaintiff for harm suffered by the plaintiff on account of a defect in the premises; e. *g.*, defective planks on the crossing. For a more correct view of the real question in *Sweeny* v. *R. R.*, see the able argument of Mr. Thorndike in *Stevens* v. *Nichols*, *post*. — ED.

STEVENS *v.* NICHOLS.

1892. 155 *Massachusetts*, 472.

Tort, to recover for injuries occasioned to the plaintiff by driving over a curbstone covered with snow in a private way controlled by the defendants. At the trial in the Superior Court, Mason, C. J., at the defendants' request, ruled that, upon the pleadings and the plaintiff's opening, he could not maintain the action, and ordered a verdict for the defendants; and the plaintiff alleged exceptions. The facts, so far as material to the points decided, appear in the opinion.

E. O. Achorn, for the plaintiff.

John L. Thorndike, for the defendant.[1]

This case bears no resemblance to *Holmes* v. *Drew*, 151 Mass. 578, where the defendant had constructed a brick sidewalk by the side of a public street, partly on her own land and partly in the street, without any line of separation, and so that the whole was apparently part of the street, and the defendant clearly intended that it should be used as part of the street. There is no similarity between such an addition to the apparent width of a public street and the opening of a private avenue or way out of a public street. The private way could not have been, or intended to be, part of the public street, and the separation between them was plain. . . .

The absence of similarity between this case and *Holmes* v. *Drew*, 151 Mass. 578, has already been pointed out; but it is also submitted that that case is the first in which it has ever been held that the owner of land was under any obligation to make it safe for a person that was allowed to come upon the land for his own convenience, and for a purpose in which the owner had no interest, whether the owner gave his consent in the form of a permission or in the form of what might, in common language, be called an invitation. Such persons were called licensees, and must take the land as they found it, subject only to this, that the owner must not lead them into danger by "something like fraud." *Gautret* v. *Egerton*, L. R. 2 C. P. 371, 374–375; *Reardon* v. *Thompson*, 149 Mass. 267, 268; Pollock on Torts, 424–426. . . .

But as regards persons coming upon land at the request, actual or tacit, of the owner upon business or for a purpose in which the owner had an *interest*, it was his duty to make it reasonably safe, and he was liable for damages arising from a neglect of this duty. *Indermaur* v. *Dames*, L. R. 1 C. P. 274, 2 C. P. 311; *Carleton* v. *Franconia Iron & Steel Co.*, 99 Mass. 216 (rock by wharf at which vessel unloaded); *The Moorcock*, 14 P. D. 64 (a similar case); *Davis* v. *Central Congregational Society*, 129 Mass. 367 (plaintiff attending a conference of churches at defendant's meeting-house, an object in which both parties

[1] The report in 155 Mass. 472 does not give any portion of the arguments. The following passages are extracts from the printed brief for the defendant. — Ed.

had an interest; also, p. 371, "a dangerous place without warning"); Pollock on Torts, 415–418.

It is this *common interest*, not the form of the license or invitation, that creates the liability (*Holmes* v. *North Eastern Ry. Co.*, L. R. 4 Ex. 254, 6 Ex. 123).

The distinction between these two classes of cases is that in one the owner of the land has an *interest* in the person's coming there, while in the other the authority to come upon the land is a pure *gratuity*. It is reasonable that the owner should undertake some duty in respect of the condition of the land when he brings another person there for an object in which he himself has an interest. But there is no reason why he should undertake any such duty when he makes a gift of the privilege of going upon his land. The privilege is only a gift, whether the owner gives it because it is asked for, or whether he offers it first, or asks or "invites" the other to accept it. It may in a sense be said that a person is "induced" to go upon land by a license or permission of the owner, but the real inducement is his own convenience. When the owner asks him to walk over his land whenever it is agreeable to him, and he goes there, he does so because it is agreeable to him, and not because the owner asks him. He is in law a *licensee* going upon the land for his own convenience by the owner's permission, and not a person brought there for a purpose in which the owner has an interest.

Licensees, however, have a right to expect that the owner will not create a new danger while the license continues, and he is liable for the consequences if he does create such a danger; *e. g.*, by making an excavation near a path, as in *Oliver* v. *Worcester*, 102 Mass. 489, 502, or by placing an obstruction in an avenue, as in *Corby* v. *Hill*, 4 C. B. N. S. 556, 567, or by carelessly throwing a keg into a passageway, as in *Corrigan* v. *Union Sugar Refinery*, 98 Mass. 577, or by negligent management of trains at a private crossing of a railway habitually used by the public with the assent of the company, as in *Sweeny* v. *Old Colony Rld. Co.*, 10 Allen, 368; *Murphy* v. *Boston & Albany Rld. Co.*, 133 Mass. 121; *Hanks* v. *Boston & Albany Rld. Co.*, 147 Mass. 495; *Byrne* v. *New York Central Rld. Co.*, 104 N. Y. 362; *Swift* v. *Staten Island Rld. Co.*, 123 N. Y. 645; *Taylor* v. *Delaware & Hudson Canal Co.*, 113 Pa. St. 162, 175.

The principle of these cases is stated by Willes, J., in *Gautret* v. *Egerton*, L. R. 2 C. P., p. 373, as follows: "If I dedicate a way to the public which is full of ruts and holes, the public must take it as it is. If I dig a pit in it, I may be liable for the consequences; but, if I do nothing, I am not."

The same principle is alluded to in *June* v. *Boston & Albany Rld. Co.*, 153 Mass. p. 82, where the court speaks of "cases in which even unintended damage done to a licensee by actively bringing force to bear upon his person will stand differently from merely passively leaving land in a dangerous condition."

The cases above mentioned include all that are cited in *Holmes* v. *Drew*, 151 Mass. 580. In none of them is it held or suggested that the railway company was liable for any defect or obstruction in the crossing, or that the landowner was liable for any excavation or obstruction existing when the permission was granted.

[After citing cases where the court said that some kind of inducement or invitation was necessary to create a liability for want of care in running trains.] But it was not suggested that the inducement or invitation would create any liability for defects in the crossing itself which the company gratuitously allowed the public to use.

[Referring to cases where there is implied license to the public to use a crossing.] The probability known to the company that some one may be there in pursuance of the license is treated . . . as the ground of liability in such cases for want of care in running trains. . . . But there is nothing in any of the cases above mentioned tending to support the proposition that the knowledge of the habitual use of the crossing, pursuant to the implied permission, would create a liability for defects in the crossing itself or impose any kind of duty to make it safe or convenient.

. . . . . .

Holmes v. *Drew* (151 Mass. 578) does not belong to either of the two last classes of cases. The plaintiff (1) did not go there upon the defendant's land for any purpose in which the defendant was interested, and (2) the defendant did nothing to make the place less safe than it was when it was first opened to the public. The plaintiff was a volunteer, going upon the defendant's land with her full permission, but entirely for his own convenience. These distinctions do not appear to have been called to the attention of the court. The judgment, which is very short, seems to proceed upon the ground that the defendant, by paving a footway partly on her own land and allowing it to remain apparently a part of the street, showed an *intention* that it should be used by foot passengers, and that this would amount to an *implied invitation*, which imposed on her a duty to make it reasonably safe. If this is to be taken literally, a permission ceases to be a *license* if it is *intended* that it shall be used; and an *invitation* imposes the same duty when it is given gratuitously for the pleasure of the donee as when it is given for an object in which the giver has an interest; and the owner of land that gives permission to cross his land can escape liability only by proving that he did not *intend* the permission to be used. It is submitted that the authorities cited in that case do not support this doctrine. Two of them are cases where the invitation was to come upon the land for a purpose in which the owner had an interest, and in the three others a licensee was injured by negligence in something done after the license was given. . . .

LATHROP, J. The declaration in this case, so far as material to the questions presented at the argument, alleged that the defendants on the day of the accident were, and had been for a long time, lessees and

occupants of an estate on Atlantic Avenue in Boston; that the defendants maintained a way or street down by their premises, "leading out of said Atlantic Avenue, and extending to other premises beyond; that said street was in all particulars like the public streets of the city of Boston, being paved with granite blocks, and having sidewalks, and to all appearances was a public thoroughfare; that the defendants had placed no sign or notice of any kind upon or about said street . . . which would give warning to the plaintiff or to the public that said street was private property, or dangerous, but had erected a granite curbing out into said street, extending one half the distance across the same, on a line with the rear of their estate, said granite curbing being from six to seven inches above the grade of the paving; that said obstruction was dangerous both by day and by night to all persons who entered upon or passed through said street; that on or about said day the plaintiff had business that called him to the premises that lie beyond the estate of the defendants on said street, and, supposing and assuming that said street was a highway, and being induced by the acts and omissions of these defendants to so suppose and assume, entered in and upon said street to drive through the same; that said obstruction was covered by snow at said time, and plaintiff was unable to see the same; and, while in the exercise of due care, his sleigh struck said granite curbing," and he was thrown out and injured.

The opening of the plaintiff's counsel added but little to the declaration. It stated that "the snow lay perfectly level" where the curbstone was; that the plaintiff was driving through the defendants' way "into the way lying beyond, of which it was . . . an extension," to reach the works of the company for which he was working. It also stated that, before the defendants controlled the way under the written lease, they owned the premises, erected the building, paved the way, and put in the curbstone; "that ever since this building and other buildings had been erected down there the public made use of that way, as they would use any other street in the city; that is, as much as they had any occasion to pass down there with teams or on foot."

It does not appear that the plaintiff had any right in the way, unless he had it as one of the public. There is no allegation or statement that the plaintiff had ever used the way before, or that he knew the way was paved, or noticed whether there was a sign or not. Indeed, if he was then using the way for the first time, the fair inference would be, from the statement of the condition of the snow, that the fact that the way was paved was unknown to him until after the accident, and did not operate as an inducement to enter the way. The declaration contained no allegation as to any use by the public of the way, and the statement in the opening of counsel, that the public made use of that way, was qualified by the words, "that is, as much as they had any occasion to pass down there with teams or on foot." It is difficult to see how vehicles of any description could, when the paving

was sufficiently visible to act as an inducement, go over that portion of the way which the defendants controlled.

Without laying stress upon these points, we are of opinion that the declaration and the opening of the plaintiff's counsel do not show that there was any breach on the part of the defendants of any duty which they owed the plaintiff. The defendants were not obliged to put up a sign notifying travellers on the public street that the passageway was not a public way. *Galligan* v. *Metacomet Manuf. Co.*, 143 Mass. 527; *Reardon* v. *Thompson*, 149 Mass. 267; *Redigan* v. *Boston & Maine Railroad*, *ante*, 44.

Nor can the fact that the passageway was paved be considered an invitation or inducement to the public to enter upon it for their own convenience. The defendants have a right to pave it for their own use or for the use of their customers. *Johnson* v. *Boston & Maine Railroad*, 125 Mass. 75; *Heinlein* v. *Boston & Providence Railroad*, 147 Mass. 136; *Reardon* v. *Thompson*, 149 Mass. 267; *Donnelly* v. *Boston & Maine Railroad*, 151 Mass. 210; *Redigan* v. *Boston & Maine Railroad*, *ante*, 44.

There was in this case no allegation and no statement that the defendants had any knowledge that the public was using the passageway, or of such a condition of things that it can be said that they must have known of it. But if it be assumed that there was such use and such acquiescence that a license might be implied, the plaintiff stands in no better position. "The general rule is," as stated by Mr. Justice Holmes in *Reardon* v. *Thompson*, *ubi supra*, "that a licensee goes upon land at his own risk, and must take the premises as he finds them." See also *Redigan* v. *Boston & Maine Railroad*, *ante*, 44; *Gautret* v. *Egerton*, L. R. 2 C. P. 371, 374.

The licensor has, however, no right to create a new danger while the license continues. *Oliver* v. *Worcester*, 102 Mass. 489, 502; *Corrigan* v. *Union Sugar Refinery*, 98 Mass. 577; *Corby* v. *Hill*, 4 C. B. (N. S.) 556. So a railroad company which allows the public habitually to use a private crossing of its tracks cannot use active force against a person or vehicle crossing under a license, express or implied. *Sweeny* v. *Old Colony & Newport Railroad*, 10 Allen, 368; *Murphy* v. *Boston & Albany Railroad*, 133 Mass. 121; *Hanks* v. *Boston & Albany Railroad*, 147 Mass. 495. See *June* v. *Boston & Albany Railroad*, 153 Mass. 79, 82.

We have no occasion to consider whether the case of *Holmes* v. *Drew*, 151 Mass. 578, is open to the criticism that it is inconsistent with the doctrine that a person who dedicates a footway to the public use is not obliged to keep it in repair (see *Fisher* v. *Prowse*, 2 B. & S. 770, 780, and *Robbins* v. *Jones*, 15 C. B. (N. S.) 221), as we are of opinion that that case has no application to the case at bar. In *Holmes* v. *Drew*, the defendant made a continuous pavement in front of his house, partly on his own land and partly on the public land; and it was held that the jury might infer from this an invitation to walk

over the whole pavement. In the case at bar, the defendants merely opened a private way into a public street, and we fail to see that they thereby invited the public to use it, even though it were paved.

Exceptions overruled.

HAROBINE *v.* ABBOTT.

1900. 177 *Massachusetts*, 59.

TORT, for personal injuries occasioned to the plaintiff by falling into an excavation in a certain way in Holyoke, known as Howard Street, owned by the defendant. The accident occurred between half-past eight and quarter to nine o'clock on the evening of September 7, 1899. Trial in the Superior Court, before Maynard, J., who, at the close of the evidence for the plaintiff and at the request of the defendant, directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

P. H. Sheehan, for the plaintiff.

A. L. Green & F. F. Bennett, for the defendant.

KNOWLTON, J. This case is governed by the decision in *Moffatt* v. *Kenny*, 174 Mass. 311. All the facts relied on as grounds for a recovery in the present case existed in that case, and some of them seemed more favorable to the plaintiff than those now before us. The principles applicable to such cases have been discussed so often and so lately by this court that it is unnecessary to state them now.

The plaintiff was injured on the defendant's land, where he had no rights except as a licensee. There was no invitation or inducement to the public to use the way by a representation that it was a public street which the public could use in the exercise of a legal right, and with an assurance that they would find there provision for their safety such as the law requires of the public authorities in the maintenance of public streets. The defendant had opened a way for his own convenience and the convenience of his tenants and those to whom he gave rights, and he had permitted others to pass over it merely as licensees. The signs at the ends of the way informed all persons coming there that they had not the rights enjoyed by the public in passing over public highways, and that they must pass at their own risk. If the signs were placed there by the city, and not by the defendant, they were as effectual to notify travellers that they were not on the public highway as if the defendant had maintained them. See also *Stevens v. Nichols*, 155 Mass. 472.

This case differs materially from *D'Amico* v. *Boston*, 176 Mass. 599. In that case the place where the plaintiff was injured had long been a public highway, and was left open for the public to be used without notice of the discontinuance of the way, and without anything to indi-

cate that it was no longer a public highway. It was actually in use by the public, and there was no other road open for travel between Fayville and Marlborough at that time. Moreover, the city of Boston was then under a contract with the town of Southborough to secure safe and convenient ways of travel between Southborough and the neighboring towns, and between the different parts of the town, during the progress of the work. This contract had been approved by an act of the legislature and was binding upon the city. The conduct of the city under these circumstances was equivalent to a representation to the public that the road was still a public highway, and an invitation to use it as such in the expectation that it would be found safe.

Exceptions overruled.

BEEHLER *v.* DANIELS.

1894. 18 *Rhode Island*, 563.

Trespass on the Case. Certified from the Common Pleas Division on demurrer to the declaration.

May 1, 1894. Stiness, J. The plaintiff seeks to recover for injury caused by falling into an elevator well in the defendants' building, which he entered in the discharge of his duty, as a member of the fire department of the city of Providence, in answering a call to extinguish a fire. The negligence alleged in the first count is a failure to guard and protect the well; and in the second count such a packing of merchandise as to guide and conduct one to the unguarded and unprotected well. The defendants demur to the declaration, alleging as grounds of demurrer that they owed no duty to the plaintiff; that he entered their premises in the discharge of a public duty and assumed the risks of his employment; that he was in the premises without invitation from them; and that they are not liable for consequences which they could not and were not bound to foresee.

The decisive question thus raised is, Did the defendants, under the circumstances, owe to the plaintiff a duty, for failure in which they are liable to him in damages? The question is not a new one, and we think it is safe to say that it has never been answered otherwise than in favor of the defendants. The plaintiff argues that it was his duty to enter the premises, and, consequently, since an owner may reasonably anticipate the liability of a fire, a duty arises from the owner to the fireman to keep his premises guarded and safe. An extension of this argument to its legitimate result, as a rule of law, is sufficiently startling to show its unsoundness. The liability to fire is common to all buildings and at all times. Hence every owner of every building must at all times keep every part of his property, in such condition, that a fireman, unacquainted with the place, and groping about in darkness and smoke, shall come upon no obstacle,

opening, machine or anything whatever which may cause him injury. This argument was urged in *Woodruff* v. *Bowen*, 136 Ind. 431; but the court said: "We are of the opinion that the owner of a building in a populous city does not owe it as a duty at common law, independent of any statute or ordinance, to keep such building safe for firemen or other officers, who, in a contingency, may enter the same under a license conferred by law."

Undoubtedly the plaintiff in this case had the right to enter the defendants' premises, and the character of his entry was that of a licensee. Cooley on Torts, *313. But no such duty as is averred in this declaration is due from an owner to a licensee. This question is discussed in the case just cited, as also in many others. For example, in *Reardon* v. *Thompson*, 149 Mass. 267, Holmes, J., says: "But the general rule is that a licensee goes upon land at his own risk, and must take the premises as he finds them. An open hole, which is not concealed otherwise than by the darkness of the night, is a danger which a licensee must avoid at his peril." So in *Mathews* v. *Bensel*, 51 N. J. Law, 30, Beasley, C. J., says: "The substantial ground of complaint laid in the count is, that the defendants did not properly construct their planer, and, being a dangerous instrument, did not surround it with proper safeguards. But there is no legal principle that imposes such a duty as this on the owner of property with respect to a mere licensee. This is the recognized rule. In the case of *Holmes* v. *Northeastern Railway Co.*, L. R. 4 Exch. 254, 256, Baron Channell says: 'That where a person is a mere licensee he has no cause of action on account of the dangers existing in the place he is permitted to enter.'" In *Parker* v. *Portland Publishing Co.*, 69 Me. 173, this question is fully examined, the court holding it to be well settled, if the plaintiff was at the place where the injury was received by license merely, that the defendant would owe him no duty and that he could not recover. See also *Indiana, etc., Railway Co.* v. *Barnhart*, 115 Ind. 399; *Gibson* v. *Leonard*, 37 Ill. App. 344; *Bedell* v. *Berkey*, 76 Mich. 435.

There is a clear distinction between a license and an invitation to enter premises, and an equally clear distinction as to the duty of an owner in the two cases. An owner owes to a licensee no duty as to the condition of premises, unless imposed by statute, save that he should not knowingly let him run upon a hidden peril or wilfully cause him harm; while to one invited he is under obligation for reasonable security for the purposes of the invitation. The plaintiff's declaration does not set out a cause of action upon either of these grounds, and the cases cited and relied on by him fall within the two classes of cases described, and mark the line of duty very clearly. *Parker* v. *Barnard*, 135 Mass. 116, was the case of a police officer who had entered a building, the doors of which were found open in the night time, to inspect it according to the rules of the police department, and fell down an unguarded elevator well. A statute required

such wells to be protected by railings and trap doors. Judgment having been given for the defendant at the trial, a new trial was ordered upon the ground of a violation of statute. The court says: "The owner or occupant of land or a building is not liable, at common law, for obstructions, pitfalls, or other dangers there existing, as, in the absence of any inducement or invitation to others to enter, he may use his property as he pleases. But he holds his property 'subject to such reasonable control and regulation of the mode of keeping and use as the legislature, under the police power vested in them by the Constitution of the Commonwealth, may think necessary for the preventing of injuries to the rights of others and the security of the public health and welfare.'" Then, likening the plaintiff to a fireman, the court also says: "Even if they must encounter the danger arising from neglect of such precautions against obstructions and pitfalls as those invited or induced to enter have a right to expect, they may demand, as against the owners or occupants, that they observe the statute in the construction and management of their building." In *Learoyd* v. *Godfrey*, 138 Mass. 315, a police officer fell down an uncovered well in or near a passageway to a house where he was called to quell a disturbance of the peace. A verdict for the plaintiff was sustained upon the ground that the jury must have found that the officer was using the passageway by the defendant's invitation and that the evidence warranted the finding. *Gordon* v. *Cummings*, 152 Mass. 513, was the case of a letter carrier who fell into an elevator well, in a hallway where he was accustomed to leave letters in boxes put there for that purpose. The court held that there was an implied invitation to the carrier to enter the premises. In *Engel* v. *Smith*, 82 Mich. 1, the plaintiff fell through a trap door left open in a building where he was employed. The question of duty is not discussed in the case but simply the fact of negligence. In *Bennett* v. *Railroad Co.*, 102 U. S. 577, the plaintiff, a passenger, fell through a hatch hole in the depot floor. The court construed the declaration as setting out facts which amounted to an invitation to the plaintiff to pass over the route which he took through the shed depot where the hatch hole was.

In the present case the plaintiff sets out no violation of a statute, or facts which amount to an invitation, and, consequently, under the well-settled rule of law, the defendants were under no liability to him for the condition of their premises or the packing of their merchandise. The demurrer to the declaration must therefore be sustained.

Walter B. Vincent & Amasa M. Eaton, for plaintiff.

William G. Roelker, for defendants.

CHAPTER X.

EXTRA-HAZARDOUS OCCUPATIONS. — ACTING AT PERIL. — DUTY OF INSURING SAFETY.

FLETCHER *v.* RYLANDS ET AL.

1865. *Law Reports*, 3 *Hurlstone & Coltman*, 774.[1]

FLETCHER *v.* RYLANDS ET AL.

1866. *Law Reports*, 1 *Exchequer*, 265.

RYLANDS ET AL., PLAINTIFFS IN ERROR *v.* FLETCHER, DEFENDANT IN ERROR.

1868. *Law Reports*, 3 *House of Lords*, 330.

IN November, 1861, Fletcher brought an action against Rylands and Horrocks to recover damages for an injury caused to his mines by water flowing into them from a reservoir which defendants had constructed. The declaration (set out in L. R. 1 Exch. 265, 266) contained three counts, each count alleging negligence on the part of the defendants. The case came on for trial at the Liverpool Summer Assizes, 1862, when a verdict was entered for the plaintiff, subject to an award to be thereafter made by an arbitrator. Subsequently the arbitrator was directed, instead of making an award, to state a special case for the consideration of the Court of Exchequer.

The material facts in the special case stated by the arbitrator were as follows: —

Fletcher, under a lease from Lord Wilton, and under arrangements with other landowners, was working coal mines under certain lands. He had worked the mines up to a spot where he came upon old horizontal passages of disused mines, and also upon vertical shafts which seemed filled with marl and rubbish.

Rylands and Horrocks owned a mill standing on land near that under which Fletcher's mines were worked. With permission of Lord Wilton, they constructed on Lord Wilton's land a reservoir to supply water to their mill. They employed a competent engineer and competent contractors to construct the reservoir. It was not known to Rylands and Horrocks, nor to any of the persons employed by them, that any coal had ever been worked under or near the site of the reservoir; but

[1] Statement abridged. Arguments in all the courts omitted; also opinions in Court of Exchequer. — ED.

in point of fact the coal under the site of the reservoir had been partially worked at some time or other beyond living memory, and there were old coal workings under the site of the reservoir communicating by means of other and intervening old underground workings with the recent workings of Fletcher.

In the course of constructing and excavating for the bed of the said reservoir, five old shafts, running vertically downwards, were met with in the portion of land selected for the site of the said reservoir. At the time they were so met with the sides or walls of at least three of them were constructed of timber, and were still in existence, but the shafts themselves were filled up with marl, or soil of the same kind as the marl or soil which immediately surrounded them, and it was not known to, or suspected by, the defendants, or any of the persons employed by them in or about the planning or constructing of the said reservoir, that they were (as they afterwards proved to be) shafts which had been made for the purpose of getting the coal under the land in which the said reservoir was made, or that they led down to coal workings under the site of the said reservoir.

For the selection of the site of the said reservoir, and for the planning and constructing thereof, it was necessary that the defendants should employ an engineer and contractors, and they did employ for those purposes a competent engineer and competent contractors, by and under whom the said site was selected and the said reservoir was planned and constructed, and on the part of the defendants themselves there was no personal negligence or default whatever in or about or in relation to the selection of the said site, or in or about the planning or construction of the said reservoir; but in point of fact reasonable and proper care and skill were not exercised by or on the part of the persons so employed by them, with reference to the shafts so met with as aforesaid, to provide for the sufficiency of the said reservoir to bear the pressure of water which, when filled to the height proposed, it would have to bear.

The said reservoir was completed about the beginning of December, 1860, when the defendants caused the same to be partially filled with water, and on the morning of the 11th December in the same year, whilst the reservoir was so partially filled, one of the shafts which had been so met with as aforesaid gave way and burst downwards; in consequence of which the water of the reservoir flowed into the old workings underneath, and by means of the underground communications so then existing between those old coal workings and the plaintiff's coal workings in the plaintiff's colliery, as above described, large quantities of the water so flowing from the said reservoir as aforesaid found their way into the said coal workings in the plaintiff's colliery, and by reason thereof the said colliery became and was flooded, and the working thereof was obliged to be and was for a time necessarily suspended.

The question for the opinion of the Court was whether the plaintiff was entitled to recover damages from the defendants by reason of the matters thus stated by the arbitrator.

Manisty (with whom was *J. A. Russell*), for plaintiff.
Mellish (*T. Jones* with him), for defendants.

Cur. adv. vult.

The Court of Exchequer (POLLOCK, C. B., and MARTIN, B., concurring; BRAMWELL, B., dissenting) gave judgment for defendants.

Plaintiff brought error to the Exchequer Chamber.

Manisty, Q. C. (*J. A. Russell* with him), for plaintiff.
Mellish, Q. C. (*T. Jones* with him), for defendants.

Cur. adv. vult.

May 14, 1866. The judgment of the Court (WILLES, BLACKBURN, KEATING, MELLOR, MONTAGUE, SMITH, and LUSH, JJ.) was delivered by

BLACKBURN, J. This was a special case stated by an arbitrator, under an order of *nisi prius*, in which the question for the Court is stated to be, whether the plaintiff is entitled to recover any and, if any, what damages from the defendants by reason of the matters thereinbefore stated.

In the Court of Exchequer, the Chief Baron and Martin, B., were of opinion that the plaintiff was not entitled to recover at all, Bramwell, B., being of a different opinion. The judgment in the Exchequer was consequently given for the defendants, in conformity with the opinion of the majority of the Court. The only question argued before us was whether this judgment was right, nothing being said about the measure of damages in case the plaintiff should be held entitled to recover. We have come to the conclusion that the opinion of Bramwell, B., was right, and that the answer to the question should be that the plaintiff was entitled to recover damages from the defendants by reason of the matters stated in the case, and consequently that the judgment below should be reversed, but we cannot at present say to what damages the plaintiff is entitled.

It appears from the statement in the case that the plaintiff was damaged by his property being flooded by water which, without any fault on his part, broke out of a reservoir constructed on the defendants' land by the defendants' orders, and maintained by the defendants.

It appears from the statement in the case [see pp. 267–268], that the coal under the defendants' land had, at some remote period, been worked out; but this was unknown at the time when the defendants gave directions to erect the reservoir, and the water in the reservoir would not have escaped from the defendants' land, and no mischief would have been done to the plaintiff, but for this latent defect in the defendants' subsoil. And it further appears [see pp. 268–269] that the defendants selected competent engineers and contractors to make their reservoir, and themselves personally continued in total ignorance of what we have called the latent defect in the subsoil; but that these persons employed by them in the course of the work became aware of the existence of the ancient shafts filled up with soil, though they did not know or suspect that they were shafts communicating with old workings.

It is found that the defendants, personally, were free from all blame, but that in fact proper care and skill was not used by the persons employed by them to provide for the sufficiency of the reservoir with reference to these shafts. The consequence was that the reservoir when filled with water burst into the shafts, the water flowed down through them into the old workings, and thence into the plaintiff's mine, and there did the mischief.

The plaintiff, though free from all blame on his part, must bear the loss, unless he can establish that it was the consequence of some default for which the defendants are responsible. The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land. It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbors; but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more. If the first be the law, the person who has brought on his land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from any latent defect which ordinary prudence and skill could not detect.

Supposing the second to be the correct view of the law, a further question arises subsidiary to the first, viz., whether the defendants are not so far identified with the contractors whom they employed as to be responsible for the consequences of their want of care and skill in making the reservoir in fact insufficient with reference to the old shafts, of the existence of which they were aware, though they had not ascertained where the shafts went to.

We think that the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches.

The case that has most commonly occurred and which is most frequently to be found in the books is as to the obligation of the owner of cattle which he has brought on his land to prevent their escaping and doing mischief. The law as to them seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape; that is, with regard to tame beasts, for the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore; but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too.

As early as the Year Book, 20 Ed. 4, 11, placitum 10, Brian, C. J., lays down the doctrine in terms very much resembling those used by Lord Holt in *Tenant* v. *Goldwin*, 2 Ld. Raym. 1089, 1 Salk. 360, which will be referred to afterwards. It was trespass with cattle. Plea, that the defendant's land adjoined a place where defendant had common, that the cattle strayed from the common, and defendant drove them back as soon as he could. It was held a bad plea. Brian, C. J., says: "It behoves him to use his common so that he shall do no hurt to another man, and if the land in which he has common be not enclosed, it behoves him to keep the beasts in the common and out of the land of any

other." He adds, when it was proposed to amend by pleading that they were driven out of the common by dogs, that although that might give a right of action against the master of the dogs, it was no defence to the action of trespass by the person on whose land the cattle went. In the recent case of *Cox* v. *Burbidge*, 13 C. B. N. S. 438 (E. C. L. R. vol. 106), 32 L. J. C. P. 89, Williams, J., says: "I apprehend the general rule of law to be perfectly plain. If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbor, and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial." So in *May* v. *Burdett*, 9 Q. B. 112 (E. C. L. R. vol. 42), the Court, after an elaborate examination of the old precedents and authorities, came to the conclusion that "a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril." And in 1 Hale's Pleas of the Crown, 430, Lord Hale states that where one keeps a beast, knowing its nature or habits are such that the natural consequence of his being loose is that he will harm men, the owner "must at his peril keep him up safe from doing hurt; for though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages;" though, as he proceeds to show, he will not be liable criminally without proof of want of care. In these latter authorities the point under consideration was damage to the person, and what was decided was, that where it was known that hurt to the person was the natural consequence of the animal being loose, the owner should be responsible in damages for such hurt, though where it was not known to be so, the owner was not responsible for such damages; but where the damage is, like eating grass or other ordinary ingredients in damage feasant, the natural consequence of the escape, the rule as to keeping in the animal is the same. In Com. Dig. *Droit.* (M. 2), it is said that "if the owner of 200 acres in a common moor enfeoffs B. of 50 acres, B. ought to enclose at his peril, to prevent damage by his cattle to the other 150 acres. For if his cattle escape thither they may be distrained damage feasant. So the owner of the 150 acres ought to prevent his cattle from doing damage to the 50 acres at his peril." The authority cited is Dyer, 372 b., where the decision was that the cattle might be distrained; the inference from that decision, that the owner was bound to keep in his cattle at his peril, is, we think, legitimate, and we have the high authority of Comyns for saying that such is the law. In the note to Fitzherbert, Nat. Brevium, 128, which is attributed to Lord Hale, it is said, "If A. and B. have lands adjoining, where there is no enclosure, the one shall have trespass against the other on an escape of their beasts respectively: Dyer, 372, Rastal Ent. 621, 20 Ed. 4, 10; although wild dogs, &c., drive the cattle of the one into the lands of the other." No case is known to us on which in replevin it has ever been attempted to plead in bar to an avowry for

distress damage feasant, that the cattle had escaped without any negligence on the part of the plaintiff, and surely if that could have been a good plea in bar, the facts must often have been such as would have supported it. These authorities, and the absence of any authority to the contrary, justify Williams, J., in saying, as he does in *Cox* v. *Burbridge*, *supra*, that the law is clear that in actions for damage occasioned by animals that have not been kept in by their owners, it is quite immaterial whether the escape is by negligence or not.

As has been already said, there does not appear to be any difference in principle between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land water, filth, or stenches, or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbor; and the case of *Tenant* v. *Goldwin*, *supra*, is an express authority that the duty is the same, and is, to keep them in at his peril.

As Martin, B., in his judgment below, appears not to have understood that case in the same manner as we do, it is proper to examine it in some detail. It was a motion in arrest of judgment after judgment by default, and therefore all that was well pleaded in the declaration was admitted to be true. The declaration is set out at full length in the report in 6 Mod. p. 311. It alleged that the plaintiff had a cellar which lay contiguous to a messuage of the defendant, "and used (*solebat*) to be separated and fenced from a privy house of office, parcel of the said messuage of defendant, by a thick and close wall, which belongs to the said messuage of the defendant, and by the defendant of right ought to have been repaired (*jure debuit reparari*)." Yet he did not repair it, and for want of repair filth flowed into plaintiff's cellar. The case is reported by Salkeld, who argued it, in 6 Mod., and by Lord Raymond, whose report is the fullest. The objection taken was that there was nothing to show that the defendant was under any obligation to repair the wall, that, it was said, being a charge not of common right, and the allegation that the wall *de jure debuit reparari* by the defendant being an inference of law which did not arise from the facts alleged. Salkeld argued that this general mode of stating the right was sufficient in a declaration, and also that the duty alleged did of common right result from the facts stated. It is not now material to inquire whether he was or was not right on the pleading point. All three reports concur in saying that Lord Holt, during the argument, intimated an opinion against him on that, but that after consideration the Court gave judgment for him on the second ground. In the report of 6 Mod. 314, it is stated: "And at another day *per totam curiam:* The declaration is good; for there is a sufficient cause of action appearing in it; but not upon the word '*solebat.*' If the defendant has a house of office enclosed with a wall which is his, he is of common right bound to use it so as not to annoy another. . . . The reason here is, that one must use his own so as thereby not to hurt another, and as of common

right one is bound to keep his cattle from trespassing on his neighbor, so he is bound to use anything that is his so as not to hurt another by such user. . . . Suppose one sells a piece of pasture lying open to another piece of pasture which the vendor has, the vendee is bound to keep his cattle from running into the vendor's piece; so of dung or anything else." There is here an evident allusion to the same case in Dyer, see *ante*, p. 334, as is referred to in Com. Dig. *Droit.* (M. 2). Lord Raymond in his report, 2 Ld. Raym. at p. 1092, says: "The last day of term, Holt, C. J., delivered the opinion of the Court that the declaration was sufficient. He said that upon the face of this declaration there appeared a sufficient cause of action to entitle the plaintiff to have his judgment; that they did not go upon the *solebat*, or the *jure debuit reparari*, as if it were enough to say that the plaintiff had a house and the defendant had a wall, and he ought to repair the wall; but if the defendant has a house of office, and the wall which separates the house of office from the plaintiff's house is all the defendant's, he is of common right bound to repair it. . . . The reason of this case is upon this account, that every one must so use his own as not to do damage to another; and as every man is bound so to look to his cattle as to keep them out of his neighbor's ground, that so he may receive no damage; so he must keep in the filth of his house of office that it may not flow in upon and damnify his neighbor. . . . So if a man has two pieces of pasture which lie open to one another, and sells one piece, the vendee must keep in his cattle so as they shall not trespass upon the vendor. So a man shall not lay his dung so high as to damage his neighbor, and the reason of these cases is because every man must so use his own as not to damnify another." Salkeld, who had been counsel in the case, reports the judgment much more concisely (1 Salk. 361), but to the same effect; he says: "The reason he gave for his judgment was because it was the defendant's wall and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbor, and that it was a trespass on his neighbor, as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbor's, . . . he must repair the wall of his house of office, for he whose dirt it is must keep it that it may not trespass." It is worth noticing how completely the reason of Lord Holt corresponds with that of Brian, C. J., in the cases already cited in 20 Ed. 4. Martin, B., in the Court below says that he thinks this was a case without difficulty, because the defendant had, by letting judgment go by default, admitted his liability to repair the wall, and that he cannot see how it is an authority for any case in which no such liability is admitted. But a perusal of the report will show that it was because Lord Holt and his colleagues thought (no matter for this purpose whether rightly or wrongly) that the liability was not admitted, that they took so much trouble to consider what liability the law would raise from the admitted facts, and it does therefore seem to us to be a very weighty authority

in support of the position that he who brings and keeps anything, no matter whether beasts, or filth, or clean water, or a heap of earth or dung on his premises, must at his peril prevent it from getting on his neighbor's, or make good all the damage which is the natural consequence of its doing so. No case has been found in which the question as to the liability for noxious vapors escaping from a man's works by inevitable accident has been discussed, but the following case will illustrate it. Some years ago several actions were brought against the occupiers of some alkali works at Liverpool for the damage alleged to be caused by the chlorine fumes of their works. The defendants proved that they at great expense erected contrivances by which the fumes of chlorine were condensed and sold as muriatic acid, and they called a great body of scientific evidence to prove that this apparatus was so perfect that no fumes possibly could escape from the defendants' chimneys. On this evidence it was pressed upon the jury that the plaintiff's damage must have been due to some of the numerous other chimneys in the neighborhood; the jury, however, being satisfied that the mischief was occasioned by chlorine, drew the conclusion that it had escaped from the defendants' works somehow, and in each case found for the plaintiff. No attempt was made to disturb these verdicts on the ground that the defendants had taken every precaution which prudence or skill could suggest to keep those fumes in, and that they could not be responsible unless negligence were shown; yet, if the law be as laid down by the majority of the Court of Exchequer, it would have been a very obvious defence. If it had been raised the answer would probably have been that the uniform course of pleading in actions on such nuisances is to say that the defendant caused the noisome vapors to arise on his premises, and suffered them to come on the plaintiff's, without stating that there was any want of care or skill in the defendant, and that the case of *Tenant* v. *Goldwin*, *supra*, showed that this was founded on the general rule of law, that he whose stuff it is must keep it that it may not trespass. There is no difference in this respect between chlorine and water; both will, if they escape, do damage, the one by scorching and the other by drowning, and he who brings them there must at his peril see that they do not escape and do that mischief. What is said by Gibbs, C. J., in *Sutton* v. *Clarke*, 6 Taunt. 44 (E. C. L. R. vol. 1), though not necessary for the decision of the case, shows that that very learned judge took the same view of the law that was taken by Lord Holt. But it was further said by Martin, B., that when damage is done to personal property, or even to the person, by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible; and this is no doubt true, and as was pointed out by Mr. Mellish during his argument before us, this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as, for instance, where an unruly horse gets on the footpath of a public street and kills a passenger, *Hammack* v. *White*, 11 C. B. N. S. 588 (E. C. L. R. vol

103); 31 L. J. (C. P.) 129; or where a person in a dock is struck by the falling of a bale of cotton which the defendant's servants are lowering: *Scott* v. *London Dock Company*, 3 H. & C. 596; 35 L. J. (Ex.) 17, 220; and many other similar cases may be found. But we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who by the license of the owner pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what *prima facie* was a trespass, can be explained on the same principle, viz., that the circumstances were such as to show that the plaintiff had taken that risk upon himself. But there is no ground for saying that the plaintiff here took upon himself any risk arising from the uses to which the defendants should choose to apply their land. He neither knew what these might be, nor could he in any way control the defendants, or hinder their building what reservoirs they liked, and storing up in them what water they pleased, so long as the defendants succeeded in preventing the water which they there brought from interfering with the plaintiff's property.

The view which we take of the first point renders it unnecessary to consider whether the defendants would or would not be responsible for the want of care and skill in the persons employed by them, under the circumstances stated in the case [pp. 268–269].

We are of opinion that the plaintiff is entitled to recover, but as we have not heard any argument as to the amount, we are not able to give judgment for what damages. The parties probably will empower their counsel to agree on the amount of damages; should they differ on the principle the case may be mentioned again.

Judgment for the plaintiff.

Rylands and Horrocks brought error to the House of Lords against the judgment of the Exchequer Chamber, which had reversed the judgment of the Court of Exchequer.

July, 1868. *Sir R. Palmer*, Q. C., and *T. Jones*, Q. C., for the original defendants, now plaintiffs in error.

Munisty, Q. C., and *J. A. Russell*, Q. C., for the plaintiff below, now defendant in error.

[Arguments omitted.]

THE LORD CHANCELLOR (Lord Cairns). My Lords, in this case the plaintiff (I may use the description of the parties in the action) is the occupier of a mine and works under a close of land. The defendants

are the owners of a mill in his neighborhood, and they proposed to make a reservoir for the purpose of keeping and storing water to be used about their mill upon another close of land, which, for the purposes of this case, may be taken as being adjoining to the close of the plaintiff, although in point of fact some intervening land lay between the two. Underneath the close of land of the defendants on which they proposed to construct their reservoir there were certain old and disused mining passages and works. There were five vertical shafts and some horizontal shafts communicating with them. The vertical shafts had been filled up with soil and rubbish, and it does not appear that any person was aware of the existence either of the vertical shafts or of the horizontal works communicating with them. In the course of the working by the plaintiff of his mine he had gradually worked through the seams of coal underneath the close, and had come into contact with the old and disused works underneath the close of the defendants.

In that state of things the reservoir of the defendants was constructed. It was constructed by them through the agency and inspection of an engineer and contractor. Personally, the defendants appear to have taken no part in the works, or to have been aware of any want of security connected with them. As regards the engineer and the contractor, we must take it from the case that they did not exercise, as far as they were concerned, that reasonable care and caution which they might have exercised, taking notice, as they appear to have taken notice, of the vertical shafts filled up in the manner which I have mentioned. However, my Lords, when the reservoir was constructed and filled, or partly filled, with water, the weight of the water bearing upon the disused and imperfectly filled-up vertical shafts, broke through those shafts. The water passed down them and into the horizontal workings, and from the horizontal workings under the close of the defendants it passed on into the workings under the close of the plaintiff, and flooded his mine, causing considerable damage, for which this action was brought.

The Court of Exchequer, when the special case stating the facts to which I have referred was argued, was of opinion that the plaintiff had established no cause of action. The Court of Exchequer Chamber, before which an appeal from this judgment was argued, was of a contrary opinion, and the judges there unanimously arrived at the conclusion that there was a cause of action, and that the plaintiff was entitled to damages.

My Lords, the principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had

passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so by leaving, or by interposing, some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature.

As an illustration of that principle, I may refer to a case which was cited in the argument before your Lordships, the case of *Smith* v. *Kenrick*, in the Court of Common Pleas, 7 C. B. 515 (E. C. L. R. vol. 62).

On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land; and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and if in the course of their doing it the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the plaintiff and injuring the plaintiff, then for the consequence of that, in my opinion, the defendants would be liable. As the case of *Smith* v. *Kenrick* is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illustrated by another case in the same Court, the case of *Baird* v. *Williamson*, 15 C. B. N. S. 317 (E. C. L. R. vol. 109), which was also cited in the argument at the Bar.

My Lords, these simple principles, if they are well founded, as it appears to me they are, really dispose of this case.

The same result is arrived at on the principles referred to by Mr. Justice Blackburn in his judgment in the Court of Exchequer Chamber, where he states the opinion of that Court as to the law in these words: "We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made

unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

My Lords, in that opinion I must say I entirely concur. Therefore, I have to move your Lordships that the judgment of the Court of Exchequer Chamber be affirmed, and that the present appeal be dismissed with costs.

Lord Cranworth. My Lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Mr. Justice Blackburn in delivering the opinion of the Exchequer Chamber. If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.

In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of *Lambert* v. *Bessey*, reported by Sir Thomas Raymond (Sir T. Raym. 421). And the doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non lædat alienum.* This is the principle of law applicable to cases like the present, and I do not discover in the authorities which were cited anything conflicting with it.

The doctrine appears to me to be well illustrated by the two modern cases in the Court of Common Pleas referred to by my noble and learned friend. I allude to the two cases of *Smith* v. *Kenrick*, *supra*, and *Baird* v. *Williamson*, *supra*. In the former the owner of a coal mine on the higher level worked out the whole of his coal, leaving no barrier between his mine and the mine on the lower level, so that the water percolating through the upper mine flowed into the lower mine, and obstructed the owner of it in getting his coal. It was held that the owner of the lower mine had no ground of complaint. The defendant, the owner of the upper mine, had a right to remove all his coal. The

damage sustained by the plaintiff was occasioned by the natural flow or percolation of water from the upper strata. There was no obligation on the defendant to protect the plaintiff against this. It was his business to erect or leave a sufficient barrier to keep out the water, or to adopt proper means for so conducting the water as that it should not impede him in his workings. The water in that case was only left by the defendant to flow in its natural course.

But in the later case of *Baird* v. *Williamson*, the defendant, the owner of the upper mine, did not merely suffer the water to flow through his mine without leaving a barrier between it and the mine below, but in order to work his own mine beneficially he pumped up quantities of water which passed into the plaintiff's mine in addition to that which would have naturally reached it, and so occasioned him damage. Though this was done without negligence and in the due working of his own mine, yet he was held to be responsible for the damage so occasioned. It was in consequence of his act, whether skilfully or unskilfully performed, that the plaintiff had been damaged, and he was therefore held liable for the consequences. The damage in the former case may be treated as having arisen from the act of God; in the latter, from the act of the defendant.

Applying the principle of these decisions to the case now before the House, I come without hesitation to the conclusion that the judgment of the Exchequer Chamber was right. The plaintiff had a right to work his coal through the lands of Mr. Whitehead and up to the old workings. If water naturally rising in the defendants' land (we may treat the land as the land of the defendants for the purpose of this case) had by percolation found its way down to the plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint. Even if all the old workings had been made by the plaintiff, he would have done no more than he was entitled to do; for, according to the principle acted on in *Smith* v. *Kenrick*, the person working the mine under the close in which the reservoir was made had a right to win and carry away all the coal without leaving any wall or barrier against Whitehead's land. But that is not the real state of the case. The defendants, in order to effect an object of their own, brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff, and for that damage, however skilfully and carefully the accumulation was made, the defendants, according to the principles and authorities to which I have adverted, were certainly responsible.

I concur, therefore, with my noble and learned friend in thinking that the judgment below must be affirmed, and that there must be judgment for the defendant in error.

Judgment of the Court of Exchequer Chamber affirmed.

NICHOLS *v.* MARSLAND.

1875. *Law Reports* 10 *Exchequer*, 255.

NICHOLS *v.* MARSLAND.

1876. *Law Reports*, 2 *Exchequer Division* 1.

THE plaintiff sued as the surveyor for the County of Chester of bridges repairable at the expense of the county.

The first count of the declaration alleged that the defendant was possessed of lands and of artificial pools constructed thereon for receiving and holding, and wherein were kept, large quantities of water, yet the the defendant took so little and such bad care of the pools and the water therein that large quantities of water escaped from the pools and destroyed four county bridges, whereby the inhabitants of the county incurred expense in repairing and rebuilding them.

The second count alleged that the defendant was possessed of large quantities of water collected and contained in three artificial pools of the defendant near to four county bridges, and stated the breach as in the first count.

Plea, not guilty, and issue thereon.

At the trial before COCKBURN, C. J., at the Chester Summer Assizes, 1874, the plaintiff's witnesses gave evidence to the following effect: The defendant occupied a mansion-house and grounds at Henbury, in the County of Chester. A natural stream called Bagbrook, which rose in higher lands, ran through the defendant's grounds, and after leaving them flowed under the four county bridges in question. After entering the defendant's grounds the stream was diverted and dammed up by an artificial embankment into a pool of three acres in area called "the upper pool," from which it escaped over a weir in the embankment, and was again similarly dammed up by an artificial embankment into the "middle pool," which was between one and two acres in area. Escaping over a weir in the embankment, it was again dammed up into "the lower pool," which was between eight and nine acres in area, and from which the stream escaped into its natural and original course.

About five o'clock P. M. on the 18th of June, 1872, occurred a terrible thunder storm, accompanied by heavy rain, which continued till about three o'clock A. M. on the 19th. The rainfall was greater and more violent than any within the memory of the witnesses, and swelled the stream both above and in the defendant's grounds. On the morning of the 19th it was found that during the night the violence and volume of the water had carried away the artificial embankments of the three pools, the accumulated water in which, being thus suddenly let loose, had swelled the stream below the pools so that it carried away and

destroyed the county bridges mentioned in the declaration. At the pools were paddles for letting off the water, but for several years they had been out of working order.

Some engineers and other witnesses gave evidence that in their opinion the weir in the upper pool was far too small for a pool of that size, and that the mischief happened through the insufficiency of the means for carrying off the water. It was not proved when these ornamental pools were constructed, but it appeared that they had existed before the defendant began to occupy the property, and that no similar accident had ever occurred within the knowledge of the witnesses.

After hearing the address of the defendant's counsel, the jury said they did not wish to hear his witnesses, and that in their opinion the accident was caused by *vis major*. In answer to Cockburn, C. J., they found that there was no negligence in the construction or maintenance of the works, and that the rain was most excessive. Cockburn, C. J., being of opinion that the rainfall, though extraordinary and unprecedented, did not amount to *vis major* or excuse the defendant from liability, entered the verdict for the plaintiff for 4092*l.*, the agreed amount, reserving leave to the defendant to move to enter it for her if the Court (who were to draw inferences of fact) should be of opinion that the rainfall amounted to *vis major*, and so distinguished the case from *Rylands* v. *Fletcher*, L. R. 3 H. L. 330.

A rule *nisi* having been accordingly obtained to enter the verdict for the defendant on the ground that there was no proof of liability, the plaintiff on showing cause to be at liberty to contend that a new trial should be granted on the ground that the finding of the jury was against the weight of evidence —

May 27. *McIntyre*, Q. C., and *Coxon*, for the plaintiff, showed cause. The defendant, having for her own purposes and advantage stored a dangerous element on her premises, is liable if that element escapes and injures the property of another, even though the escape be caused by an earthquake or any form of *vis major*.

[Cleasby, B. Was not the flood brought on to the defendant's land by *vis major?*]

The pools were made by those through whom the defendant claims, and if there had been no pools the water of the natural stream would have escaped without doing injury. The case falls within the rule laid down by the judgment in *Fletcher* v. *Rylands*, L. R. 1 Ex. 265, 279, delivered by Blackburn, J.: "We think that the true rule of law is, that the person who for his own purposes brings on his lands, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or perhaps that the escape was the consequence of *vis major*, or the act of God." This passage was cited with approval by Lord Cairns, C., and Lord Cranworth on appeal. L. R. 3 H. L. 330, 339, 340.

[CLEASBY, B. There the defendant brought the water on to his own land. Not so here.]

The intimation that *vis major* would perhaps be an excuse is not confirmed by any decision or any other *dictum*. But the facts here do not amount to *vis major*. If the weirs had been larger, or the banks stronger, the mischief would not have happened. *Vis major* means something which cannot be foreseen or resisted, as an earthquake or an act of the Queen's enemies.

Hughes and *Dunn* (*Sir J. Holker*, S. G., with them), in support of the rule, cited Broom's Legal Maxims, 5th ed. p. 230: "The act of God signifies in legal phraseology any inevitable accident occurring without the intervention of man, and may indeed be considered to mean something in opposition to the act of man, as storms, tempests, and lightning: *per* Mansfield, C. J., in *Forward* v. *Pittard*, 1 T. R. 33; *Trent Navigation* v. *Wood*, 3 Esp. 131; *Rex* v. *Somerset*, 8 T. R. 312." Also *Amies* v. *Stevens*, 1 Str. 127; *Smith* v. *Fletcher*, L. R. 9 Ex. 64; *May* v. *Burdett*, 9 Q. B. 101; and *Jackson* v. *Smithson*, 15 M. & W. 563.

[The question of the verdict being against the evidence was then argued.] *Cur. adv. vult.*

June 12. The judgment of the Court (KELLY, C. B., BRAMWELL, and CLEASBY, BB.) was read by

BRAMWELL, B. In this case I understand the jury to have found that all reasonable care had been taken by the defendant, that the banks were fit for all events to be anticipated, and the weirs broad enough; that the storm was of such violence as to be properly called the act of God, or *vis major*. No doubt, as was said by Mr. McIntyre, a shower is the act of God as much as a storm; so is an earthquake in this country: yet every one understands that a storm, supernatural in one sense, may properly, like an earthquake in this country, be called the act of God, or *vis major*. No doubt not the act of God or a *vis major* in the sense that it was physically impossible to resist it, but in the sense that it was practically impossible to do so. Had the banks been twice as strong, or if that would not do, ten times, and ten times as high, and the weir ten times as wide, the mischief might not have happened. But those are not practical conditions, they are such that to enforce them would prevent the reasonable use of property in the way most beneficial to the community

So understanding the finding of the jury, I am of opinion the defendant is not liable. What has the defendant done wrong? What right of the plaintiff has she infringed? She has done nothing wrong, she has infringed no right. It is not the defendant who let loose the water and sent it to destroy the bridges. She did indeed store it, and store it in such quantites that, if it was let loose, it would do, as it did, mischief. But suppose a stranger let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any

London house, and the water did mischief to a neighbor, the occupier of the house would be liable. That cannot be. Then why is the defendant liable if some agent over which she has no control lets the water out? Mr. McIntyre contended that she would be in all cases of the water being let out, whether by a stranger or the Queen's enemies, or by natural causes, as lightning or an earthquake. Why? What is the difference between a reservoir and a stack of chimneys for such a question as this? Here the defendant stored a lot of water for her own purposes; in the case of the chimneys some one has put a ton of bricks fifty feet high for his own purposes; both equally harmless if they stay where placed, and equally mischievous if they do not. The water is no more a wild or savage animal than the bricks while at rest, nor more so when in motion: both have the same property of obeying the law of gravitation. Could it be said that no one could have a stack of chimneys except on the terms of being liable for any damage done by their being overthrown by a hurricane or an earthquake? If so, it would be dangerous to have a tree, for a wind might come so strong as to blow it out of the ground into a neighbor's land and cause it to do damage; or a field of ripe wheat, which might be fired by lightning and do mischief.

I admit that it is not a question of negligence. A man may use all care to keep the water in, or the stack of chimneys standing, but would be liable if through any defect, though latent, the water escaped or the bricks fell. But here the act is that of an agent he cannot control.

This case differs wholly from *Fletcher* v. *Rylands*, L. R. 1 Ex. 265, 279. There the defendant poured the water into the plaintiff's mine. He did not know he was doing so; but he did it as much as though he had poured it into an open channel which led to the mine without his knowing it. Here the defendant merely brought it to a place whence another agent let it loose. I am by no means sure that the likeness of a wild animal is exact. I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable. But this case and the case I put of the chimneys, are not cases of keeping a dangerous beast for amusement, but of a reasonable use of property in a way beneficial to the community. I think this analogy has made some of the difficulty in this case. Water stored in a reservoir may be the only practical mode of supplying a district and so adapting it for habitation. I refer to my judgment [3 H. & C. 788; 34 L. J. (Ex.) 181] in *Fletcher* v. *Rylands*, and I repeat that here the plaintiff had no right that has been infringed, and the defendant has done no wrong. The plaintiff's right is to say to the defendant, *Sic utere tuo ut alienum non lædas*, and that the defendant has done, and no more.

The Chief Baron and my brother Cleasby agree in this judgment. As to the plaintiff's application for a new trial on the ground that the finding of the jury is against evidence, we have spoken to Cockburn, C. J.; he is not dissatisfied therewith, and we cannot see it is wrong. Consequently the rule will be absolute to enter a verdict for the defendant. *Rule absolute.*

In Court of Appeal.

Cotton, Q. C. (*McIntyre*, Q. C., and *Coxon* with him), for the plaintiff, appellant.[1]

Assuming the jury to be right in finding that the defendant was not guilty of negligence, and that the rainfall amounted to *vis major*, or the act of God, still the defendant is liable because she has, without necessity and voluntarily for her own pleasure, stored on her premises an element which was liable to be let loose, and which, if let loose, would be dangerous to her neighbors. Even if she be considered innocent of wrong-doing, why should the plaintiff suffer for the defendant's voluntary act of turning an otherwise harmless stream into a source of danger? But for the defendant's embankments, the excessive rainfall would have escaped without doing injury.

Gorst, Q. C., and *Hughes* (*Dunn* with them), for defendant, cited *Carstairs* v. *Taylor*, L. R. 6 Ex. 217; *McCoy* v. *Danbey*, 20 Penn. State, 85; *Tennent* v. *Earl of Glasgow*, 1 Court of Session Cases, 3d series, 133.

The judgment of the Court (Cockburn, C. J., James, and Mellish, L. JJ., and Baggallay, J. A.) was read by

Mellish, L. J. This was an action brought by the county surveyor [under 43 Geo. 3 c. 59, s. 4] of the County of Chester against the defendant to recover damages on account of the destruction of four county bridges which had been carried away by the bursting of some reservoirs. At the trial before Cockburn, C. J., it appeared that the defendant was the owner of a series of artificial ornamental lakes, which had existed for a great number of years, and had never, previous to the 18th day of June, 1872, caused any damage. On that day, however, after a most unusual fall of rain, the lakes overflowed, the dams at their end gave way, and the water out of the lakes carried away the county bridges lower down the stream. The jury found that there was no negligence either in the construction or the maintenance of the reservoirs, but that if the flood could have been anticipated, the effect might have been prevented.[2] Upon this finding the Lord Chief Justice, acting on the decision in *Rylands* v. *Fletcher*, L. R. 3 H. L. 330, as the nearest authority applicable to the case, directed a verdict for the plaintiff, but gave leave to move to enter a verdict for the defendant. The Court of Exchequer have ordered the verdict to be entered for the defendant, and from their decision an appeal has been brought before us.

The appellant relied upon the decision in the case of *Rylands* v. *Fletcher*, *supra*. In that case the rule of law on which the case was decided was thus laid down by Mr. Justice Blackburn in the Exchequer

[1] Argument abridged.

[2] The judgment of the Court below, read by Bramwell, B., states the finding thus: "In this case I understand the jury to have found that all reasonable care had been taken by the defendant, that the banks were fit for all events to be anticipated, and the weirs broad enough; that the storm was of such violence as to be properly called the act of God, or *vis major*."

Chamber [L. R. 1 Ex. 279]: "We think the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of the sort exists here it is unnecessary to inquire what excuse would be sufficient." It appears to us that we have two questions to consider: First, the question of law, which was left undecided in *Rylands* v. *Fletcher*, *supra*, — Can the defendant excuse herself by showing that the escape of the water was owing to *vis major*, or, as it is termed in the law books, the "act of God?" And, secondly, if she can, did she in fact make out that the escape was so occasioned?

Now, with respect to the first question, the ordinary rule of law is that when the law creates a duty and the party is disabled from performing it without any default of his own, by the act of God, or the King's enemies, the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good notwithstanding any accident by inevitable necessity. We can see no good reason why that rule should not be applied to the case before us. The duty of keeping the water in and preventing its escape is a duty imposed by the law, and not one created by contract. If, indeed, the making a reservoir was a wrongful act in itself, it might be right to hold that a person could not escape from the consequences of his own wrongful act. But it seems to us absurd to hold that the making or the keeping a reservoir is a wrongful act in itself. The wrongful act is not the making or keeping the reservoir, but the allowing or causing the water to escape. If, indeed, the damages were occasioned by the act of the party without more — as where a man accumulates water on his own land, but, owing to the peculiar nature or condition of the soil, the water escapes and does damage to his neighbor — the case of *Rylands* v. *Fletcher*, *supra*, establishes that he must be held liable. The accumulation of water in a reservoir is not in itself wrongful; but the making it and suffering the water to escape, if damage ensue, constitute a wrong. But the present case is distinguished from that of *Rylands* v. *Fletcher*, *supra*, in this, that it is not the act of the defendant in keeping this reservoir, an act in itself lawful, which alone leads to the escape of the water, and so renders wrongful that which but for such escape would have been lawful. It is the supervening *vis major* of the water caused by the flood, which, superadded to the water in the reservoir (which of itself would have been innocuous), causes the disaster. A defendant cannot, in our opinion, be properly said to have caused or allowed the water to escape, if the act of God or the Queen's enemies was the real cause of its escaping without any fault on the part of the defendant. If a reservoir was destroyed by an earthquake, or the Queen's enemies destroyed it in con-

ducting some warlike operation, it would be contrary to all reason and justice to hold the owner of the reservoir liable for any damage that might be done by the escape of the water. We are of opinion, therefore, that the defendant was entitled to excuse herself by proving that the water escaped through the act of God.

The remaining question is, did the defendant make out that the escape of the water was owing to the act of God? Now the jury have distinctly found, not only that there was no negligence in the construction or the maintenance of the reservoirs, but that the flood was so great that it could not reasonably have been anticipated, although, if it had been anticipated, the effect might have been prevented; and this seems to us in substance a finding that the escape of the water was owing to the act of God. However great the flood had been, if it had not been greater than floods that had happened before and might be expected to occur again, the defendant might not have made out that she was free from fault; but we think she ought not to be held liable because she did not prevent the effect of an extraordinary act of nature, which she could not anticipate. In the late case of *Nugent* v. *Smith*, 1 C. P. D. 423, we held that a carrier might be protected from liability for a loss occasioned by the act of God, if the loss by no reasonable precaution could be prevented, although it was not absolutely impossible to prevent it.

It was indeed ingeniously argued for the appellant that at any rate the escape of the water was not owing solely to the act of God, because the weight of the water originally in the reservoirs must have contributed to break down the dams, as well as the extraordinary water brought in by the flood. We think, however, that the extraordinary quantity of water brought in by the flood is in point of law the sole proximate cause of the escape of the water. It is the last drop which makes the cup overflow.

On the whole we are of opinion that the judgment of the Court of Exchequer ought to be affirmed. *Judgment affirmed.*[1]

BOX *v.* JUBB ET AL.

1879. *Law Reports*, 4 *Exchequer Division*, 76.[2]

CASE stated in an action brought in the County Court of Yorkshire, holden at Bradford, to recover damages by reason of the overflowing of a reservoir of the defendants.

[1] The question whether the rule should be made absolute for a new trial, on the ground that the verdict was against the evidence, was reserved for future discussion, if the plaintiff should desire it.

[2] Arguments omitted. — ED.

1. The defendants are the owners and occupiers of a woollen cloth-mill situate at Batley, in the county of York, and for the necessary supply of water to the mill is a reservoir, also belonging to the defendants. Such mill and reservoir have been built, and constructed, and used, as at the time of the overflowing of the reservoir hereinafter mentioned, for many years.

2. The plaintiff is the tenant of premises adjoining the reservoir.

3. The reservoir is supplied with water from a main drain or watercourse. The surplus water from the reservoir passes through an outlet into the main drain or watercourse. The inlet and outlet are furnished with proper doors or sluices, so as (when required) to close the communications between the reservoir and the main drain or watercourse.

4. The whole of the premises are within the borough of Batley, and the defendants have the right to use the main drain or watercourse by obtaining a supply of water therefrom and discharging their surplus-water thereinto, as hereinbefore stated, but have otherwise no control over the drain or watercourse, which does not belong to them.

5. In the month of December, 1877, the plaintiff's premises were flooded by reason of the overflowing of the defendants' reservoir.

6. Such overflowing was caused by the emptying of a large quantity of water from a reservoir, the property of a third party, into the main drain or watercourse at a point considerably above the defendants' premises, and by an obstruction in the main drain or watercourse below the outlet of the defendants' reservoir, whereby the water from such main drain or watercourse was forced through the doors or sluices (which were closed at the time) into the defendants' reservoir.

7. Such obstruction was caused by circumstances over which the defendants had no control, and without their knowledge; and had it not been for such obstruction the overflowing of the reservoir would not have happened.

8. The defendants' reservoir, and the communications between it and the main drain or watercourse, and the doors or sluices, are constructed and maintained in a proper manner, so as to prevent the overflowing of the reservoir under all ordinary circumstances.

9. No negligence or wrongful act is attributable to either party.

Under the circumstances the judge of the County Court was of opinion that the defendants were liable for the damage sustained by the plaintiff, and accordingly gave judgment for the plaintiff.

The question for the opinion of the Court, having regard to the facts set out in the case, was whether the defendants were liable for the damage sustained by the plaintiff by reason of the flooding of his premises, such flooding being caused by water from a reservoir belonging to a third party, over which the defendants had no control, and without any knowledge or negligence on defendants' part, the overflowing of the defendants' reservoir being occasioned by the act of a third party, over whom the defendants had no control, and no wrongful act or negligence being attributable to the defendants, and the direct cause

of the damage being the obstruction in the main drain or watercourse, which was caused by circumstances over which the defendants had no control and without their knowledge.

Gully, Q. C. (*George C. Thompson*, with him), for defendants.

Bray, for plaintiff.

KELLY, C. B. I think this judgment must be reversed. The case states that for many years the defendants have been possessed of a reservoir to which there are gates or sluices. There has been an overflow from the reservoir which has caused damage to the plaintiff. The question is, what was the cause of this overflow? Was it anything for which the defendants are responsible — did it proceed from their act or default, or from that of a stranger over which they had no control? The case is abundantly clear on this, proving beyond a doubt that the defendants had no control over the causes of the overflow, and no knowledge of the existence of the obstruction. The matters complained of took place through no default or breach of duty of the defendants, but were caused by a stranger over whom and at a spot where they had no control. It seems to me to be immaterial whether this is called *vis major* or the unlawful act of a stranger; it is sufficient to say that the defendants had no means of preventing the occurrence. I think the defendants could not possibly have been expected to anticipate that which happened here, and the law does not require them to construct their reservoir and the sluices and gates leading to it to meet any amount of pressure which the wrongful act of a third person may impose. The judgment must be entered for the defendants.

POLLOCK, B. I also think the defendants are entitled to judgment. Looking at the facts stated, that the defendants had no control over the main drain, and no knowledge of or control over the obstruction, apart from the cases, what wrong have the defendants done for which they should be held liable? The case of *Rylands* v. *Fletcher*, L. R. 3 H. L. 330, is quite distinguishable. The case of *Nichols* v. *Marsland*, L. R. 10 Ex. 255, 14 Eng. R. 538, is more in point. The illustrations put in that case clearly go to show that if the person who has collected the water has done all that skill and judgment can do he is not liable for damage by acts over which he has no control. In the judgment of the Court of Appeal, 2 Ex. D. 1, at p. 5, Mellish, L. J., adopts the principle laid down by this Court. He says: "If indeed the damages were occasioned by the act of the party without more — as where a man accumulates water on his own land, but owing to the peculiar nature or condition of the soil the water escapes and does damage to his neighbor — the case of *Rylands* v. *Fletcher*, *supra*, establishes that he must be held liable." Here this water has not been accumulated by the defendants, but has come from elsewhere and added to that which was properly and safely there. For this the defendants, in my opinion, both on principle and authority, cannot be held liable.

Judgment for the defendants.[1]

[1] Leave to appeal was refused.

MARSHALL *v.* WELWOOD ET AL.

1876. 38 *New Jersey Law Reports* (9 *Vroom*), 339.

SUIT for damages done to the property of the plaintiff by the bursting of the boiler of a steam-engine on the adjoining property of the defendant Welwood. Garside, the other defendant, had sold this boiler to Welwood, and was experimenting with it at the time of the explosion.

The case came before the Court on a motion for a new trial, the verdict having gone for the plaintiff against both defendants.

Argued at February Term, 1876, before BEASLEY, C. J., and WOODHULL, VAN SYCKEL, and SCUDDER, JJ.

For the motion, *J. B. Vredenburgh.*

The opinion of the Court was delivered by

BEASLEY, C. J. The judge, at the trial of this cause, charged, among other matters, that as the evidence incontestably showed that one of the defendants, Welwood, was the owner of the boiler which caused the damage, he was liable in the action, unless it appeared that the same was not being run by him, or his agent, at the time of the explosion. The proposition propounded was, that a person is responsible for the immediate consequences of the bursting of a steam boiler, in use by him, irrespective of any question as to negligence or want of skill on his part.

This view of the law is in accordance with the principles maintained, with great learning and force of reasoning, in some of the late English decisions. In this class the leading case was that of *Fletcher* v. *Rylands*, L. R. 1 Exch. 265, which was a suit on account of damage done by water escaping on to the premises of the plaintiff from a reservoir which the defendant had constructed, with due care and skill, on his own land. The judgment was put on a general ground, for the Court said: "We think the true rule of law is, that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." This result was deemed just, and was sought to be vindicated on the theory that it is but reasonable that a person who has brought something on his own property, which was not naturally there, harmless to others, so long as it is confined to his own property, but which he knows to be mischievous, if it gets on his neighbor's, should be obliged to make good the damage which ensues, if he does not succeed in confining it to his own property. This principle would evidently apply to, and rule, the present case: for water is no more likely to escape from a reservoir and do damage, than steam is from a boiler; and, therefore, if he who collects the former force upon his property, and seeks, with care and

skill, to keep it there, is answerable for his want of success, so is he who, under similar conditions, endeavors to deal with the latter. There is nothing unlawful in introducing water into a properly constructed reservoir on a person's own land, nor raising steam in a boiler of proper quality; neither act, when performed, is a nuisance *per se*; and the inquiry consequently is, whether in the doing of such lawful act the party who does it is an insurer against all flaws in the apparatus employed, no matter how secret, or unascertainable by the use of every reasonable test, such flaws may be. This English adjudication takes the affirmative side of the question, conceding, however, that the subject is not controlled by any express decision, and that it is to be investigated with reference to the general grounds of jurisprudence. I have said the doctrine involved has been learnedly treated, and the decision is of great weight, and yet its reasoning has failed to convince me of the correctness of the result to which it leads, and such result is clearly opposed to the course which judicial opinion has taken in this country. The fallacy in the process of argument by which judgment is reached in this case of *Fletcher* v. *Rylands*, appears to me to consist in this: that the rule mainly applicable to a class of cases which, I think, should be regarded as, in a great degree, exceptional, is amplified and extended into a general, if not universal, principle. The principal instance upon which reliance is placed is the well-known obligation of the owner of cattle, to prevent them from escaping from his land and doing mischief. The law as to this point is perfectly settled, and has been settled from the earliest times, and is to the effect, that the owner must take charge of his cattle at his peril, and if they evade his custody he is, in some measure, responsible for the consequences. This is the doctrine of the Year Books, but I do not find that it is grounded in any theoretical principle, making a man answerable for his acts or omissions, without regard to his culpability. That in this particular case of escaping cattle so stringent an obligation upon the owner should grow up, was not unnatural. That the beasts of the landowner should be successfully restrained, was a condition of considerable importance to the unmolested enjoyment of property, and the right to plead that the escape had occurred by inevitable accident would have seriously impaired, if it did not entirely frustrate, the process of distress damage feasant. Custom has had much to do in giving shape to the law, and what is highly convenient readily runs into usage, and is accepted as a rule. It would but rarely occur that cattle would escape from a vigilant owner, and in this instance such rare exceptions seem to have passed unnoticed, for there appears to be no example of the point having been presented for judicial consideration; for the conclusion of the liability of the unnegligent owner rests in *dicta*, and not in express decision. But waiving this, there is a consideration which seems to me to show that this obligation which is put upon the owner of errant cattle should not be taken to be a principle applicable, in a general way, to the use or ownership of property,

which is this: that the owner of such cattle is, after all, liable only *sub modo* for the injury done by them, that is, he is reponsible, with regard to tame beasts who have no exceptionally vicious disposition so far as is known, for the grass they eat, and such like injuries, but not for the hurt they may inflict upon the person of others, — a restriction on liability which is hardly consistent with the notion that this class of cases proceeds from a principle so wide as to embrace all persons whose lawful acts produce, without fault in them, and in an indirect manner, ill results which disastrously affect innocent persons. If the principle ruling these cases was so broad as this, conformity to it would require that the person being the cause of the mischief should stand as an indemnifier against the whole of the damage. It appears to me, therefore, that this rule, which applies to damage done by straying cattle, was carried beyond its true bounds, when it was appealed to [in] proof that a person in law is answerable for the natural consequences of his acts, such acts being lawful in themselves, and having been done with proper care and skill.

The only other cases which were referred to in support of the judgment under consideration were those of one who was sued for not keeping the wall of his privy in repair, to the detriment of his neighbor, being the case of *Tenant* v. *Goulding*, 1 Salk. 21, and several actions which it is said had been brought against the owners of some alkali works for damages alleged to have been caused by the chlorine fumes escaping from their works [which], the case showed, had been erected upon the best scientific principles. But I am compelled to think that these cases are but a slender basis for the large structure put upon it. The case of *Tenant* v. *Goulding* presented merely the question whether a landowner is bound in favor of his neighbor to keep the wall of his privy in repair, and the Court held that he was, and that he was responsible if, for want of such reparation, the filth escaped on the adjoining land. No question was mooted as to his liability in case the privy had been constructed with care and skill with a view to prevent the escape of its contents, and had been kept in a state of repair. Not to repair a receptacle of this kind when it was in want of repairs was, in itself, a *prima facie* case of negligence, and it seems to me that all the Court decided was to hold so.

But this consideration is also to be noticed, both with respect to this last case, and that of the injurious fumes from the alkali works, that in truth they stand somewhat by themselves, and having this peculiarity: that the things in their nature partake largely of the character of nuisances. Take the alkali works as an example. Placed in a town, under ordinary circumstances, they would be a nuisance. When the attempt is made by scientific methods to prevent the escape of the fumes, it is an attempt to legalize that which is illegal, and the consequence is, it may well be held that, failing in the attempt, the nuisance remains.

I cannot agree that, from these indications, the broad doctrine is to

be drawn that a man in law is an insurer that the acts which he does, such acts being lawful and done with care, shall not injuriously affect others. The decisions cited are not so much examples of legal maxims as of exceptions to such maxims; for they stand opposed, and in contrast to principles, which it seems to me must be considered much more general in their operation and elementary in their nature.

The common rule, quite institutional in its character, is that, in order to sustain an action for a tort, the damage complained of must have come from a wrongful act. Mr. Addison, in his work on Torts, Vol. I., p. 3, very correctly states this rule. He says: "A man may, however, sustain grievous damage at the hands of another, and yet, if it be the result of inevitable accident, or a lawful act, done in a lawful manner, without any carelessness or negligence, there is no legal injury, and no tort giving rise to an action of damages." Among other examples, he refers to an act of force, done in necessary self-defence, causing injury to an innocent bystander, which he characterizes as *damnum sine injuria*, — "for no man does wrong or contracts guilt in defending himself against an aggressor." Other instances of a like kind are noted, such as the lawful obstruction of the view from the windows of dwelling-houses; or the turning aside, to the detriment of another, the current of the sea or river, by means of walls or dikes. Many illustrations, of the same bearing, are to be found scattered through the books of reports. Thus, Dyer, 25 b, says: "That if a man have a dog which has killed sheep, the master of the dog being ignorant of such quality and property of the dog, the master shall not be punished for that killing." This case belongs to a numerous, well-known class, where animals which are usually harmless do damage, the decisions being that, under such conditions, the owners of the animals are not responsible. Akin to these in principle are cases of injuries done to innocent persons by horses in the charge of their owners, becoming ungovernable by reason of unexpected causes; or where a person in a dock was struck by the falling of a bale of cotton which the defendants' servants were lowering, *Scott* v. *London Dock Co.*, 3 H. & C. 596 or in cases of collision, either on land or sea. *Hammack* v. *White*, 11 C. B. (N. S.) 588.

It is true that these cases of injury done to personal property, or to persons, are, in the case of *Fletcher* v. *Rylands*, sought to be distinguished from other damages, on the ground that they are done in the course of traffic on the highways, whether by land or sea, which cannot be conducted without exposing those whose persons or property are near it to some inevitable risk. But this explanation is not sufficiently comprehensive, for, if a frightened horse should, in his flight, break into an inclosure, no matter how far removed from the highway, the owner would not be answerable for the damage done.[1] Nor is the reason upon which it rests satisfactory, for, if traffic cannot be carried on

[1] See *Brown* v. *Collins*, 16 Am. Rep. 372 and note.

without some risk, why can it not be said with the same truth, that the other affairs of life, though they be transacted away from the highways, cannot be carried on without some risk; and if such risk is, in the one case, to be borne by innocent persons, why not in the other? Business done upon private property may be a part of traffic as well as that done by the means of the highway, and no reason is perceived why the same favor is not to be extended to it in both situations. But, besides this, the reason thus assigned for the immunity of him who is the unwilling producer of the damage has not been the ground on which the decisions illustrative of the rule have been put; that ground has been that the person sought to be charged had not done any unlawful act. Everywhere, in all the branches of the law, the general principle that blame must be imputable as a ground of responsibility for damage proceeding from a lawful act, is apparent. A passenger is injured by the breaking of an axle of a public conveyance; the carrier is not liable, unless negligence can be shown. A man's guest is hurt by the falling of a chandelier; a suit will not lie against the host, without proof that he knew, or ought to have known of the existence of the danger.[1] If the steam-engine which did the mischief in the present case had been in use in driving a train of cars on a railroad, and had, in that situation, exploded, and had inflicted injuries on travellers or bystanders, it could not have been pretended that such damage was actionable, in the absence of the element of negligence or unskilfulness. By changing the place of the accident to private property, I cannot agree that a different rule obtains.

It seems to me, therefore, that in this case it was necessary to submit the matter, as a question of fact for the jury, whether the occurrence doing the damage complained of, was the product of pure accident, or the result of want of care or skill on the part of the defendant or his agents.

This view of the subject is taken in the American decisions. A case, in all respects in point, is that of *Losee* v. *Buchanan*, 51 N. Y 476; s. c., 10 Am. Rep. 623. The facts were essentially the same with those of the principal case. It was an action growing out of the explosion of a steam boiler upon private property, and the ruling was that such action could not be sustained without proof of fault or negligence. In that report the line of cases is so fully set out that it is unnecessary here to repeat them.

The rule should be made absolute.[2]

[1] See *Kendall* v. *Boston*, 19 Am. Rep. 446.

[2] See *St. Peter* v. *Dennison*, 17 Am. Rep. 258 and note.

BROWN *v.* COLLINS.

1873. 53 *New Hampshire*, 442.

Trespass, by Albert H. Brown against Lester Collins, to recover the value of a stone post on which was a street lamp, situated in front of his place of business in the village of Tilton. The post stood upon the plaintiff's land, but near the southerly line of the main highway leading through the village and within four feet of said line. There was nothing to indicate the line of the highway, nor any fence or other obstruction between the highway, as travelled, and the post. The highway crosses the railroad near the place of accident, and the stone post stood about fifty feet from the railroad track at the crossing. The defendant was in the highway, at or near the railroad crossing, with a pair of horses loaded with grain, going to the grist-mill in Tilton village. The horses became frightened by an engine on the railroad near the crossing, and by reason thereof became unmanageable, and ran, striking the post with the end of the pole and breaking it off near the ground, destroying the lamp with the post. No other injury was done by the accident. The shock produced by the collision with the post threw the defendant from his seat in the wagon, and he struck on the ground between the horses, but suffered no injury except a slight concussion. The defendant was in the use of ordinary care and skill in managing his team, until they became frightened as aforesaid.

The foregoing facts were agreed upon for the purpose of raising the question of the right of the plaintiff to recover in this action.

Rogers, for the plaintiff.

Barnard & Sanborn, for the defendant.

Doe, J. It is agreed that the defendant was in the use of ordinary care and skill in managing his horses, until they were frightened; and that they then became unmanageable, and ran against and broke a post on the plaintiff's land. It is not explicitly stated that the defendant was without actual fault, — that he was not guilty of any malice, or unreasonable unskilfulness or negligence; but it is to be inferred that the fact was so; and we decide the case on that ground. We take the case as one where, without actual fault in the defendant, his horses broke from his control, ran away with him, went upon the plaintiff's land, and did damage there, against the will, intent, and desire of the defendant.

Sir Thomas Raymond's report of *Lambert & Olliot* v. *Bessey*, T. Raym. 421, and *Bessey* v. *Olliot & Lambert*, T. Raym. 467, is, "The question was this: A gaoler takes from the bailiff a prisoner arrested by him out of the bailiff's jurisdiction, Whether the gaoler be liable to an action of false imprisonment? and the judges of the common

pleas did all hold that he was; and of that opinion I am, for these reasons.

"1. In all civil acts, the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering; and therefore Mich. 6 *E.* 4. 7. *a. pl.* 18. *Trespass quare vi & armis clausum fregit, & herbam suam pedibus conculcando consumpsit* in six acres. The defendant pleads that he hath an acre lying next the said six acres, and upon it a hedge of thorns, and he cut the thorns, and they, *ipso invito*, fell upon the plaintiff's land, and the defendant took them off as soon as he could, which is the same trespass; and the plaintiff demurred; and adjudged for the plaintiff; for though a man doth a lawful thing, yet, if any damage do thereby befall another, he shall answer for it, if he could have avoided it. As if a man lop a tree, and the boughs fall upon another, *ipso invito*, yet an action lies. If a man shoot at butts, and hurt another unawares, an action lies. I have land through which a river runs to your mill, and I lop the fallows growing upon the river side, which accidentally stop the water, so as your mill is hindered, an action lies. If I am building my own house, and a piece of timber falls on my neighbor's house, and breaks part of it, an action lies. If a man assault me, and I lift up my staff to defend myself, and, in lifting it up, hit another, an action lies by that person, and yet I did a lawful thing. And the reason of all these cases is, because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there *actus non facit reum nisi mens sit rea.*

"Mich. 23. Car. 1. B. R. — Stile 72. *Guilbert* versus *Stone.* Trespass for entering his close, and taking away his horse. The defendant pleads, that he, for fear of his life, by threats of twelve men, went into the plaintiff's house, and took the horse. The plaintiff demurred; and adjudged for the plaintiff, because threats could not excuse the defendant, and make satisfaction to the plaintiff.

"Hob. 134, *Weaver* versus *Ward.* Trespass of assault and battery. The defendant pleads, that he was a trained soldier in London, and he and the plaintiff were skirmishing with their compauy, and the defendant, with his musket, *casualiter & per infortunium & contra voluntatem suam* in discharging of his gun hurt the plaintiff; and resolved no good plea. So here, though the defendant knew not of the wrongful taking of the plaintiff, yet that will not make any recompense for the wrong the plaintiff hath sustained. . . . But the three other judges resolved, that the defendant, the gaoler, could not be charged, because he could not have notice whether the prisoner was legally arrested or not."

In *Fletcher* v. *Rylands*,[1] L. R. 3 H. L. 330, Lord Cranworth said: "In considering whether a defendant is liable to a plaintiff

[1] See *Cahill* v. *Eastman*, 18 Minn. 324, *Madras R. Co.* v. *Zemindar of Carvetinagaram*, decided July 3, 1874, 30 L. Times Rep. (N. S.) 770.— REPORTER.

for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of *Lambert* v. *Bessey*, reported by Sir Thomas Raymond (Sir T. Raym. 421). And the doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer."

The head-note of *Weaver* v. *Ward*, Hob. 134, is: "If one trained soldier wound another, in skirmishing for exercise, an action of trespass will lie, unless it shall appear from the defendant's plea that he was guilty of no negligence, and that the injury was inevitable." The reason of the decision, as reported, was this: "For though it were agreed, that if men tilt or tourney in the presence of the king, or if two masters of defence playing their prizes kill one another, that this shall be no felony; or if a lunatic kill a man, or the like; because felony must be done *animo felonico;* yet in trespass, which tends only to give damages according to hurt or loss, it is not so; and therefore if a lunatic hurt a man, he shall be answerable in trespass; and therefore no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification, *prout ei bene licuit*), except it may be judged utterly without his fault; as if a man by force take my hand and strike you; or if here the defendant had said that the plaintiff ran across his piece when it was discharging; or had set forth the case with the circumstances, so as it had appeared to the Court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt."

There may be some ground to argue that "utterly without his fault," "inevitable," and "no negligence," in the sense intended in that case, mean no more than the modern phrase "ordinary and reasonable care and prudence;" and that, in such a case, at the present time, to hold a plea good that alleges the exercise of reasonable care, without setting forth all "the circumstances" or evidence sustaining the plea, would be substantially in compliance with the law of that case, due allowance being made for the difference of legal language used at different periods, and the difference in the forms of pleading. But the drift of the ancient English authorities on the law of torts seems to differ materially from the view now prevailing in this country. Formerly, in England, there seems to have been no well-defined test of an actionable tort. Defendants were often held liable "because," as Raymond says, "he that is damaged ought to be recompensed;" and not because, upon some clearly stated principle of law founded on actual culpability, public policy, or natural justice, he was entitled to compensation from the defendant. The law was supposed to regard "the loss and damage of the party suffering," more than the negligence and blameworthiness of the defendant: but how much more it regarded the former than the latter, was a question not settled, and

very little investigated. "The loss and damage of the party suffering," if without relief, would be a hardship to him; relief compulsorily furnished by the other party would often be a hardship to him; when and why the "loss and damage" should, and when and why they should not, be transferred from one to the other, by process of law, were problems not solved in a philosophical manner. There were precedents, established upon superficial, crude, and undigested notions; but no application of the general system of legal reason to this subject.

Mr. Holmes says: "It may safely be stated that all the more ancient examples are traceable to conceptions of a much ruder sort (than actual fault), and in modern times to more or less definitely thought-out views of public policy. The old writs in trespass did not allege, nor was it necessary to show, anything savoring of culpability. It was enough that a certain event had happened, and it was not even necessary that the act should be done intentionally, though innocently. An accidental blow was as good a cause of action as an intentional one. On the other hand, when, as in *Rylands* v. *Fletcher*, modern courts hold a man liable for the escape of water from a reservoir which he has built upon his land, or for the escape of cattle, although he is not alleged to have been negligent, they do not proceed upon the ground that there is an element of culpability in making such a reservoir, or in keeping cattle, sufficient to charge the defendant as soon as a *damnum* occurs, but on the principle that it is politic to make those who go into extra-hazardous employments take the risk on their own shoulders." He alludes to the fact that "there is no certainty what will be thought extra-hazardous in a certain jurisdiction at a certain time," but suggests that many particular instances point to the general principle of liability for the consequences of extra-hazardous undertakings as the tacitly assumed ground of decision. 7 Am. Law Rev. 652, 653, 662; 2 Kent Com. (12th ed.) 561, *n.* 1; 4 *id.* 110, *n.* 1. If the hazardous nature of things or of acts is adopted as the test, or one of the tests, and the English authorities are taken as the standard of what is to be regarded as hazardous, "it will be necessary to go the length of saying that an owner of real property is liable for all damage resulting to his neighbour's property from anything done upon his own land" (Mellish's argument in *Fletcher* v. *Rylands*, L. R. 1 Ex. 272), and that an individual is answerable "who, for his own benefit, makes an improvement on his own land, according to his best skill and diligence, and not foreseeing it will produce any injury to his neighbor, if he thereby unwittingly injure his neighbor" — Gibbs, C. J., in *Sutton* v. *Clarke*, 6 Taunt. 44, approved by Blackburn, J., in *Fletcher* v. *Rylands*, L. R. 1 Ex. 286. If danger is adopted as a test, and the English authorities are abandoned, the fact of danger, controverted in each case, will present a question for the jury, and expand the issue of tort or no tort into a question of reasonableness, in a form much broader than has been generally used; or courts will be left to

devise tests of peril, under varying influences of time and place that may not immediately produce a uniform, consistent, and permanent rule.

It would seem that some of the early English decisions were based on a view as narrow as that which regards nothing but the hardship "of the party suffering;" disregards the question whether, by transferring the hardship to the other party, anything more will be done than substitute one suffering party for another; and does not consider what legal reason can be given for relieving the party who has suffered, by making another suffer the expense of his relief. For some of those decisions, better reasons may now be given than were thought of when the decisions were announced: but whether a satisfactory test of an actionable tort can be extracted from the ancient authorities, and whether the few modern cases that carry out the doctrine of those authorities as far as it is carried in *Fletcher* v. *Rylands* (3 H. & C. 774; L. R. 1 Ex. 265; L. R. 3 H. L. 330; L. R. (Phil. ed.) 3 Ex. 352), can be sustained, is very doubtful. The current of American authority is very strongly against some of the leading English cases.

One of the strongest presentations of the extreme English view is by Blackburn, J., who says, in *Fletcher* v. *Rylands*, L. R. 1 Ex. 279, 280, 281, 282: "We think that the true rule of law is, that the person who for his own purposes brings on his lands, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems, on principle, just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should, at his peril, keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches. The case that has most commonly occurred, and which is most frequently to be found in the

books, is as to the obligation of the owner of cattle which he has brought on his land, to prevent their escaping and doing mischief. The law, as to them, seems to be perfectly settled from early times: the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape, — that is, with regard to tame beasts, for the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore [or he might have added, dogs to bite], — but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too. . . . In these latter authorities [relating to animals called mischievous or ferocious], the point under consideration was damage to the person; and what was decided was, that where it was known that hurt to the person was the natural consequence of the animal being loose, the owner should be responsible in damages for such hurt, though where it was not known to be so, the owner was not responsible for such damages; but where the damage is, like eating grass or other ordinary ingredients in damage feasant, the natural consequence of the escape, the rule as to keeping in the animal is the same. . . . There does not appear to be any difference, in principle, between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land water, filth, or stenches, or any other thing, which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbor."

This seems to be substantially an adoption of the early authorities, and an extension of the ancient practice of holding the defendant liable, in some cases, on the partial view that regarded the misfortune of the plaintiff upon whom a damage had fallen, and required no legal reason for transferring the damage to the defendant. The ancient rule was, that a person in whose house, or on whose land, a fire accidentally originated, which spread to his neighbor's property and destroyed it, must make good the loss. *Filliter* v. *Phippard*, 11 A. & E. (N. S.) 347, 354; *Tubervil* v. *Stamp*, 1 Comyns, 32; S. C., 1 Salk. 13; Com. Dig., *Action upon the case for Negligence* (A 6.); 1 Arch. N. P. 539; *Fletcher* v. *Rylands*, 3 H. & C. 790, 793; *Russell* v. *Fabyan*, 34 N. H. 218, 225. No inquiry was made into the reason of putting upon him his neighbor's loss as well as his own. The rule of such cases is applied, by Blackburn, to everything which a man brings on his land, which will, if it escape, naturally do damage. One result of such a doctrine is, that every one building a fire on his own hearth, for necessary purposes, with the utmost care, does so at the peril, not only of losing his own house, but of being irretrievably ruined if a spark from his chimney starts a conflagration which lays waste the neighborhood. "In conflict with the rule, as laid down in the English cases, is a class of cases in reference to damage from fire communicated from the adjoining premises. Fire, like water or steam, is likely

to produce mischief if it escapes and goes beyond control; and yet it has never been held in this country that one building a fire upon his own premises can be made liable if it escapes upon his neighbor's premises, and does him damage without proof of negligence." *Losee* v. *Buchanan*, 51 N. Y. 476, 487.

Everything that a man can bring on his land is capable of escaping, — against his will, and without his fault, with or without assistance, in some form, solid, liquid, or gaseous, changed or unchanged by the transforming processes of nature or art, — and of doing damage after its escape. Moreover, if there is a legal principle that makes a man liable for the natural consequences of the escape of things which he brings on his land, the application of such a principle cannot be limited to those things; it must be applied to all his acts that disturb the original order of creation; or, at least, to all things which he undertakes to possess or control anywhere, and which were not used and enjoyed in what is called the natural or primitive condition of mankind, whatever that may have been. This is going back a long way for a standard of legal rights, and adopting an arbitrary test of responsibility that confounds all degrees of danger, pays no heed to the essential elements of actual fault, puts a clog upon natural and reasonably necessary uses of matter, and tends to embarrass and obstruct much of the work which it seems to be man's duty carefully to do. The distinction made by Lord Cairns, *Rylands* v. *Fletcher*, L. R. 3 H. L. 330, between a natural and a non-natural use of land, if he meant anything more than the difference between a reasonable use and an unreasonable one, is not established in the law. Even if the arbitrary test were applied only to things which a man brings on his land, it would still recognize the peculiar rights of savage life in a wilderness, ignore the rights growing out of a civilized state of society, and make a distinction not warranted by the enlightened spirit of the common law: it would impose a penalty upon efforts, made in a reasonable, skilful, and careful manner, to rise above a condition of barbarism. It is impossible that legal principle can throw so serious an obstacle in the way of progress and improvement. Natural rights are, in general, legal rights; and the rights of civilization are, in a legal sense, as natural as any others. "Most of the rights of property, as well as of person, in the social state, are not absolute but relative," *Losee* v. *Buchanan*, 51 N. Y. 485; and, if men ever were in any other than the social state, it is neither necessary nor expedient that they should now govern themselves on the theory that they ought to live in some other state. The common law does not usually establish tests of responsibility on any other basis than the propriety of their living in the social state, and the relative and qualified character of the rights incident to that state.

In *Fletcher* v. *Rylands*, L. R. 1 Ex. 286, 287, Mr. Justice Blackburn, commenting upon the remark of Mr. Baron Martin, "that, when damage is done to personal property, or even to the person,

by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible," says, — "This is no doubt true; and, as was pointed out by Mr. Mellish during his argument before us, this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as, for instance, where an unruly horse gets on the footpath of a public street and kills a passenger, *Hammack* v. *White*, 11 C. B. N. S. 588, 31 L. J. (C. P.) 129; or where a person in a dock is struck by the falling of a bale of cotton which the defendant's servants are lowering, *Scott* v. *London Docks Company*, 3 H. & C. 596, 35 L. J. (Ex.) 17, 220; and many other similar cases may be found. But we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who, by the license of the owner, pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what, *prima facie*, was a trespass, can be explained on the same principle, viz., that the circumstances were such as to show that the plaintiff had taken that risk upon himself." This would be authority for holding, in the present case, that the plaintiff, by having his post near the street, took upon himself the risk of its being broken by an inevitable accident carrying a traveller off the street. But such a doctrine would open more questions, and more difficult ones, than it would settle. At what distance from a highway would an object be near it? What part of London is not near a street? And then, as the defendant had as good a right to be at home with his horses as to be in the highway, why might not his neighbor, by electing to live in an inhabited country, as well be held to take upon himself the risk of an inevitable accident happening by reason of the country being inhabited, as to assume a highway risk by living near a road? If neighborhood is the test, who are a man's neighbors but the whole human race? If a person, by remaining in England, is held to take upon himself one class of the inevitable dangers of that country because he could avoid that class by migrating to a region of solitude, why should he not, for a like reason, also be held to expose himself voluntarily to other classes of the inevitable dangers of that country? And where does this reasoning end?

It is not improbable that the rules of liability for damage done by brutes or by fire, found in the early English cases, were introduced by sacerdotal influence, from what was supposed to be the Roman or the

Hebrew law. 7 Am. L. Rev. 652, *note;* 1 Domat Civil Law (Strahan's translation, 2d ed.) 304, 305, 306, 312, 313; Exodus xxi: 28–32, 36; xxii: 5, 6, 9. It would not be singular if these rules should be spontaneously produced at a certain period in the life of any community. Where they first appeared is of little consequence in the present inquiry. They were certainly introduced in England at an immature stage of English jurisprudence, and an undeveloped state of agriculture, manufactures, and commerce, when the nation had not settled down to those modern, progressive, industrial pursuits which the spirit of the common law, adapted to all conditions of society, encourages and defends. They were introduced when the development of many of the rational rules now universally recognized as principles of the common law had not been demanded by the growth of intelligence, trade, and productive enterprise, — when the common law had not been set forth in the precedents, as a coherent and logical system on many subjects other than the tenures of real estate. At all events, whatever may be said of the origin of those rules, to extend them, as they were extended in *Rylands* v. *Fletcher*, seems to us contrary to the analogies and the general principles of the common law, as now established. To extend them to the present case would be contrary to American authority as well as to our understanding of legal principles.

The difficulty under which the plaintiff might labor in proving the culpability of the defendant, — which is sometimes given as a reason for imposing an absolute liability without evidence of negligence, — *Rixford* v. *Smith*, 52 N. H. 355, 359, or changing the burden of proof, *Lisbon* v. *Lyman*, 49 N. H. 553, 568, 569, 574, 575, seems not to have been given in the English cases relating to damage done by brutes or fire. And, however large or small the class of cases in which such a difficulty may be the foundation of a rule of law, since the difficulty has been so much reduced by the abolition of witness disabilities, the present case is not one of that class.

There are many cases where a man is held liable for taking, converting (*C. R. Co.* v. *Foster*, 51 N. H. 490) or destroying property, or doing something else, or causing it to be done, intentionally, under a claim of right, and without any actual fault. "Probably one half of the cases in which trespass *de bonis asportatis* is maintained, arise from a mere misapprehension of legal rights." Metcalf, J., in *Stanley* v. *Gaylord*, 1 Cush. 536, 551. When a defendant erroneously supposed, without any fault of either party, that he had a right to do what he did, and his act, done in the assertion of his supposed right, turns out to have been an interference with the plaintiff's property, he is generally held to have assumed the risk of maintaining the right which he asserted, and the responsibility of the natural consequences of his voluntary act. But when there was no fault on his part, and the damage was not caused by his voluntary and intended act; or by an act of which he knew, or ought to have known, the damage would be a

necessary, probable, or natural consequence; or by an act which he knew or ought to have known, to be unlawful, — we understand the general rule to be, that he is not liable. *Vincent* v. *Stinehour*, 7 Vt. 62; *Aaron* v. *State*, 31 Ga. 167; *Morris* v. *Platt*, 32 Conn. 75; and Judge Redfield's note to that case in 4 Am. L. Reg. (N. S.) 532; Townshend on Slander, secs. 67, 88, p. 128, *n.* 1 (2d ed.). In *Brown* v. *Kendall*, 6 Cush. 292, the defendant, having interfered to part his dog and the plaintiff's which were fighting, in raising a stick for that purpose accidentally struck the plaintiff, and injured him. It was held, that parting the dogs was a lawful and proper act which the defendant might do by the use of proper and safe means; and that if the plaintiff's injury was caused by such an act done with due care and all proper precautions, the defendant was not liable. In the decision, there is the important suggestion that some of the apparent confusion in the authorities has arisen from discussions of the question whether a party's remedy is in trespass or case, and from the statement that when the injury comes from a direct act, trespass lies, and when the damage is consequential, case is the proper form of action, — the remark concerning the immediate effect of an act being made with reference to damage for which it is admitted there is a remedy of some kind, and on the question of the proper remedy, not on the general question of liability. Judge Shaw, delivering the opinion of the court, said: "We think, as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either that the *intention* was unlawful, or that the defendant was *in fault;* for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable. 2 Greenl. Ev., secs. 85 to 92; *Wakeman* v. *Robinson*, 1 Bing. 213. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom, *Davis* v. *Saunders*, 2 Chit. R. 639; Com. Dig. *Battery*, A. (Day's ed.) and notes; *Vincent* v. *Stinehour*, 7 Vt. 62;" *James* v. *Campbell*, 5 C. & P. 372; *Alderson* v. *Waistell*, 1 C. & K. 358.

Whatever may be the rule or the exception, or the reason of it, in cases of insanity, *Weaver* v. *Ward*, Hob. 134; Com. Dig. *Battery*, A. note *d*, Hammond's ed.; *Dormay* v. *Borradaile*, 5 M. G. & S. 380; Sedgwick on Damages, 455, 456, 2d ed.; *Morse* v. *Crawford*, 17 Vt. 499; *Dickinson* v. *Barber*, 9 Mass. 225; *Krom* v. *Schoonmaker*, 3 Barb. 647; *Horner* v. *Marshall*, 5 Munf. 466; *Yeates* v. *Reed*, 4 Blackf. 463, and whatever may be the full legal definitions of necessity, inevitable danger, and unavoidable accident, the occurrence complained of in this case was one for which the defendant is not liable, unless every one is liable for all damage done by superior force overpowering him, and using him or his property as an instrument of violence. The defendant, being without fault, was as innocent as if the pole of his wagon had been hurled on the plaintiff's land by a whirlwind, or he himself, by a stronger man, had been thrown through

the plaintiff's window. Upon the facts stated, taken in the sense in which we understand them, the defendant is entitled to judgment. 1 Hilliard on Torts, ch. 3, 3d ed.; *Losee* v. *Buchanan*, 51 N. Y. 476; *Parrot* v. *Wells*, 15 Wall. 524, 537: *Roche* v. *M. G. L. Co.*, 5 Wis. 55; *Eastman* v. *Co.*, 44 N. H. 143, 156.

Case discharged.

QUINN *v.* CRIMMINGS.

1898. 171 *Massachusetts*, 255.[1]

Tort, by the administratrix of Peter L. Quinn, for injuries sustained by her intestate from the falling of a division fence, which, it was alleged, the defendant suffered to remain in an unsafe condition. At the trial in the Superior Court, before Bond, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

S. A. Fuller & C. H. Blood, for plaintiff.

H. N. Shepard, for defendant.

Holmes, J. . . . The only evidence of the defendant's interest or duty was the fact that the fence was a division fence. The defendant had not repaired it for twenty years. He removed it, it is true, after it had fallen, but that was simply clearing away rubbish from his land, and was no evidence. It admits of question whether the plaintiff had sustained the burden of proof. He was allowed to go to the jury, however, and the jury were told that the defendant had not a right to allow the fence to get into such a condition that it was liable to injure a person on the adjoining premises by reason of its want of repair. This imposed an absolute liability for want of repair as effectively as if the judge had used the more amplified and rhetorical expressions of the requests.

After dealing with want of repair, the judge went on: "Of course you have to take into consideration here the condition of the fence, and whether or not it was that which caused it to fall over; because if there had been any such extraordinary condition of things that it was blown over, and fell from any such cause as that, that might relieve the defendant from any responsibility, because he is not called upon to provide against such extraordinary conditions; but any conditions that he ought to have anticipated he is bound to provide against." A part of this was excepted to upon the refusal to modify it, as was also a refusal to give further rulings. Nothing appears in the exceptions concerning the state of the wind, and it does not appear that there was any need for the judge to deal with it more specifically, especially when the matter was not brought to his attention until the end of the charge. *McMahon* v. *O'Connor*, 137 Mass. 216.

[1] Only part of opinion is given. — Ed.

The fair meaning of what we have quoted, as a whole, is simply that the defendant was not called on to provide against winds which he could not have anticipated. This is consistent with *Cork* v. *Blossom*, 162 Mass. 330, 332. It is true that every one has notice of the force of gravitation, and therefore it would be possible logically to make owners absolutely liable if their buildings fall. Clerk & Lindsell, Torts (2d ed.), 377, 378. *Rylands* v. *Fletcher*, L. R. 3 H. L. 330. Compare Pollock, Torts (4th ed.), 470. But it is for the public welfare that buildings be put up, and here as elsewhere policy and custom have to draw the line between opposing interests. *Middlesex Co.* v. *McCue*, 149 Mass. 103, 104. That line is the line between what could have been prevented by proper precautions and accident, meaning by accident that which could not have been foreseen and guarded against otherwise than by not building. For although all accidents could be prevented by not building, yet, as it is desirable that buildings and fences should be put up, the law of this Commonwealth does not throw the risk of that act any more than that of other necessary conduct upon the actor, or make every owner of a structure insure against all that may happen, however little to be foreseen. *Cork* v. *Blossom*, *ubi supra*. The tendency of other American decisions seems to be in the same direction. 2 Jaggard, Torts, 839; see also Pollock, Torts (4th ed.), 470. This being so, the decision as to what precautions are proper naturally may vary with the nature of the particular structure. A boundary fence is not like a tall chimney, such as was in question in *Cork* v. *Blossom*. In view of the slight danger threatened by a common fence, we are of opinion that, if the jury are instructed that the owner must use the care of an ordinarily prudent man in maintaining it, it is not necessary to put the duty in more emphatic terms.

Exceptions overruled.

McCORD RUBBER CO. *v.* ST. JOSEPH WATER CO. ET AL.

1904. 181 *Missouri*, 678.[1]

APPEAL from Buchanan Circuit Court.

Action for damages for the flooding of plaintiff's cellar with water caused by defendant's negligence, whereby a large quantity of its goods stored in the cellar were damaged. Answer, a general denial.

Defendant company supplied water distributed through pipes and mains from reservoirs. A service pipe from a main carried water to a building occupied by one August. There was a bursting in a "fish-trap" used in connection with the service pipe. Water escaped on to

[1] Only so much of the case is given as relates to a single point. Arguments omitted. — ED.

the premises of August, and from thence to the adjoining premises of the plaintiff company. The jury found a verdict for the defendant. In view of the instructions given, this verdict must be regarded as negativing the allegations of negligence contained in the plaintiff's declaration.

Judgment having been rendered for defendant, the plaintiff appealed.

[Arguments and part of opinion omitted.]

VALLIANT, J. III. The plaintiff contends, however, that the defendants are liable regardless of whether they were guilty of any negligence directly causing the accident. This contention rests in the theory that one who brings into his premises anything that is liable to escape, and liable to inflict injury on his neighbors if it should escape, brings it there at his peril, and is responsible for any injury that it may cause.

That contention rests for its authority on the decision in *Rylands* v. *Fletcher*, L. R. 3 H. L. 330. In the briefs of the learned counsel for respondents, reference is made to a large number of authorities going to show that the doctrine of *Rylands* v. *Fletcher* has not been approved generally in America, and that it has been modified in England. Among the authorities so referred to are *Griffith* v. *Lewis*, 17 Mo. App. 605; *Murphy* v. *Gillum*, 73 Mo. App. 487; Cooley on Torts, 570; *Losee* v. *Buchanan*, 51 N. Y. 476; *Brown* v. *Collins*, 53 N. H. 442.

But in the facts, the case at bar is distinguished from *Rylands* v. *Fletcher*.

[After stating the facts of *Rylands* v. *Fletcher*, and quoting from the opinion of Lord Chancellor CAIRNS.] There is a wide difference between a great volume of water collected in a reservoir in dangerous proximity to the premises of another and water brought into a house through pipes in the manner usual in all cities, for the ordinary use of the occupants of the house. Whilst water so brought into a house cannot literally be said to have come in in the course of what might be called in the language above quoted of the Lord Chancellor "natural user" of the premises, yet it is brought in by the method universally in use in cities and is not to be treated as an unnatural gathering of a dangerous agent. The law applicable to the caging of ferocious animals is not applicable to water brought into a house by pipes in the usual manner.

The learned counsel for the plaintiff tried their case on the theory that the defendants were negligent, and that is the only theory on which they could have tried it.

. . . . . .

Judgment affirmed.

CHAPTER XI.

IMMUNITY OF LANDOWNER WHEN HIS RIGHTFUL USER OF HIS LAND (OR THE NATURAL CONDITION OF HIS LAND) HAS RESULTED IN DAMAGE TO HIS NEIGHBOR.

[The question when a landowner is liable for acts of user (or a condition of his land) resulting in damage to his neighbor is a topic largely discussed in books on Torts; sometimes under various specific titles; and sometimes under the broad head of Nuisance. The discussion covers a wide field: *e. g.* infringement of rights as to air, light, or support of soil; certain questions as to easements and servitudes; infringement of rights as to watercourses, percolating water, and surface water; right of an occupant to be free from indirect invasion, annoyance, or discomfort; etc., etc.

In the Law School for which the present volume is specially prepared, the above subjects are included in the course on Property; and selected cases are to be found in 2 Gray's Cases on Property, 2d edition, chapters ii and iii. In the present volume no attempt is made to give a selection of cases which would afford material for a *full* discussion of these topics.[1] But in view of the general statements of Lord Cairns and Blackburn, J. (*ante*, pp. 456, 462, 463), and the contrary views expressed by Beasley, C. J., and Doe, J. (*ante*, pp. 476, 477, 486), we insert here a few cases where the landowner was held to be acting within his right of user, and was therefore not held liable for damage to his neighbor; illustrations of *damnum sine injuria*.

Incidentally these cases furnish material to be considered in discussing the meaning and real value of the oft-quoted maxim: *Sic utere tuo ut alienum non lædas*, and the companion maxim: *Qui jure suo utitur neminem lædit;* also for discussing the meaning and value of the following proposition enunciated by Brett, M. R., in *Heaven* v. *Pender*: —

"... Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." L. R. 11 Qu. B. Div. 503, p. 509.

From the fact that most of the decisions given in this section sustain the landowner, it must not be inferred that a similar result will generally follow whenever he alleges a justification under his right of user. In many instances, as will be seen by reference to authorities collected in Gray's Cases on Property, the landowner has been adjudged to have exceeded his right of user, and hence has been held liable for the damage. In a late case the landowner was held liable for damage resulting from his careful use of the only known practicable mode of developing the mineral resources of his land. *Straight* v. *Hover*, Ohio, A. D. 1909, 87 Northeastern Reporter, 174. "The class of cases in which injurious acts of user of property may be done with impunity" is a comparatively limited class. See Clerk & Lindsell on Torts, 2d ed., 363. For cases as to the dividing line between impunity and liability, see 2 Gray's Cases on Property, 2d ed., chapters ii and iii. — Ed.]

[1] Some of these subjects are incidentally dealt with in certain cases inserted in volume i, as bearing upon the question of materiality of motive. — Ed.

ROBERTS *v.* HARRISON.

1897. 101 *Georgia*, 773.

CERTIORARI. Before Judge Hutchins. Jackson Superior Court. August Term, 1896.

E. C. Armistead, for plaintiffs.

H. H. Dean, for defendant.

SIMMONS, C. J. A petition was filed by Roberts and five others, under section 4760 of the Civil Code, for the removal of a pond of water which had collected upon the lands of W. O. Harrison. The jury returned a verdict finding the pond a nuisance, and the justices of the peace directed the sheriff or his deputy to enter upon the lands "and abate the nuisance complained of, by removing said pond in the most feasible manner." The defendant carried the case by certiorari to the superior court. There the certiorari was sustained and the judgment of the justices set aside, on the ground that while, in a sense, the pond complained of is a nuisance, it is not such a *legal nuisance* as the justices of the peace have jurisdiction to abate.

The area of the pond in question varied from time to time, and the water, partially receding, would leave exposed to the sun portions of land which had been submerged. In the processes of evaporation and by the decay of large masses of vegetable matter, noxious and deleterious gases were emitted which were injurious to the public health and to the health of persons residing in the community. The accumulation of the water was due solely to natural causes, and the defendant did not, by his own act or negligence, contribute to bring about the alleged nuisance. At one time the land had been drained by a ditch which emptied into a creek, but in consequence of the filling in and choking up of either the ditch or the creek, or both, the water accumulated and formed the pond. The defendant had done nothing to interfere with the natural drainage, and the pond was formed by the overflow of the creek due entirely to causes over which the defendant had no control.

The presence of the pond and the attendant evils were doubtless annoying and even injurious to persons residing in the neighborhood, but we think that they do not constitute a nuisance for which the defendant can be held answerable or which he can be compelled, under section 4760 of the Civil Code, to abate. This court has held that a person is not guilty of an actionable nuisance unless the injurious consequences complained of are the natural and proximate results of his own acts or failures of duty. *Brimberry* v. *S., F. & W. Ry. Co.*, 78 Ga. 641, and the cases there cited and discussed. This doctrine, we think, is the true one, and it is recognized as such by all the authorities on this point which we have examined. In 1 Wood on Nuisances, § 116, we find the rule thus stated: "Where water collects in low, marshy places, and, by reason of becoming stagnant, emits gases that

are destructive to the health, the lives even, of the community, this is not a nuisance in the legal sense; and the owner of the land is not bound to drain it, nor can he be subjected to action or indictment therefor. The reason is, that in order to create a *legal* nuisance, *the act of man* must have contributed to its existence. Ill results, however extensive or serious, that flow from natural causes, cannot become a nuisance, even though the person upon whose premises the cause exists could remove it with little trouble and expense. . . . Thus it will be seen that a nuisance cannot arise from the neglect of one to remove that which exists or arises from purely natural causes." See also *Giles* v. *Aratkir*, [*Giles* v. *Walker*] 24 Q. B. Div. 656; *Mohr* v. *Gault*, 10 Wis. 513, s. c. 78 Am. Dec 687; *Hartwell* v. *Armstrong*, 19 Barb. (N. Y. Sup. Ct.) 166; *State* v. *Rankin*, 3 S. C. 438, s. c. 16 Am. Rep. 737; *Peck* v. *Herrington*, 109 Ill. 611, s. c. 50 Am. Rep. 637; *Woodruff* v. *Fisher*, 17 Barb. 224.

The facts in the present case place it within the principles announced in the cases above cited, and the judgment of the justices of the peace was erroneous. The certiorari of the defendant was properly sustained and the judgment of the justices set aside.

Judgment affirmed. All the Justices concurring.

MIDDLESEX COMPANY *v.* McCUE.

1889. 149 *Massachusetts*, 103.

Bill in Equity to restrain the defendant from filling the plaintiff's mill-pond, and to compel him to remove material already deposited in it. Hearing upon the pleadings and a master's report, before Holmes, J., who reserved the case for the consideration of the full court, in substance as follows:

The master's report contained the following facts. The plaintiff, a mill corporation, was the owner of the mill-pond in question, which was raised by its dam, and of the land under the pond, and for thirty years and more had constantly used the water power thus created for manufacturing purposes. The defendant was the owner of land upon the side of a hill sloping down to the pond as far as the land of the plaintiff. The defendant had annually used and cultivated his land, in the ordinary way, to within a short distance from the plaintiff's land, for the purpose of raising garden vegetables, and had brought thereon manure and ashes, which he had dug and spaded into the soil. The defendant had erected neither a fence nor a wall to prevent the filling of the plaintiff's pond, or to prevent the raising of his own land, which the plaintiff had the right to flow, or for the purpose of banking against further flowage.

The plaintiff contended that the defendant, by cultivating the land, had changed the character of the soil, had caused it to wash into its

mill-pond, and that the land could not be legally so used if it interfered with the plaintiff's rights of flowage, and caused the filling up of its mill-pond.

The master found that although in fact the cultivation of the land did cause a raising of the land near the shore of the plaintiff's pond, and a filling up of the pond, it was such a use of the land as might be legally made; and ruled that the defendant might, as he had done, cultivate his land, and apply ashes and other fertilizers in the ordinary course of husbandry.

B. F. Butler & P. Webster, for the plaintiff.

C. Cowley, for the defendant.

HOLMES, J. This is a bill brought to restrain the defendant from filling up the plaintiff's mill-pond. The master reports that the defendant's land is on the slope of a hill running down to the pond, and that the only acts of the defendant tending to fill the pond have been those of cultivating and manuring his own soil in the ordinary way, for the purpose of raising garden vegetables. The question is whether the defendant has a right to do these acts notwithstanding their effects upon the plaintiff's land and water rights.

The respective rights and liabilities of adjoining land owners cannot be determined in advance by a mathematical line or a general formula, certainly not by the simple test of whether the obvious and necessary consequence of a given act by one is to damage the other. The fact that the damage is foreseen, or even intended, is not decisive apart from statute. Some damage a man must put up with, however plainly his neighbor foresees it before bringing it to pass. *Rideout* v. *Knox,* 148 Mass. 368. Liability depends upon the nature of the act, and the kind and degree of harm done, considered in the light of expediency and usage. For certain kinds there is no liability, no matter what the extent of the harm. A man may lose half the value of his house by the obstruction of his view, and yet be without remedy. In other cases his rights depend upon the degree of the damage, or rather of its cause. He must endure a certain amount of noise, smells, shaking, percolation, surface drainage, and so forth. If the amount is greater, he may be able to stop it, and to recover compensation. As in other matters of degree, a case which is near the line might be sent to a jury to determine what is reasonable. In a clear case it is the duty of the court to rule upon the parties' rights.

The present case presents one of those questions of degree. If the plaintiff were complaining of offensive drainage from a vault, it would be entitled to recover upon proof of the fact. *Ball* v. *Nye,* 99 Mass. 582. If it complained that the surface drainage was made offensive by the nature of the substance spread by the defendant upon his land, the case would be nearer the line, and the right to recover possibly might depend upon further circumstances, such as whether the substances were usual and reasonable fertilizers, or refuse, etc. See *Brown* v. *Illius,* 27 Conn. 84, and 25 Conn. 583. In this case it com-

plains, not that the substances brought down are offensive, but that the defendant causes any solid substance to be brought down at all. Practically it would forbid the defendant to dig his land, at least without putting up a guard, since the surface drainage necessarily carries more of the soil along with it if the earth is made friable by digging. This would cut down the defendant's right of surface drainage to a very small matter indeed. We are of opinion that a man has a right to cultivate his land in the usual and reasonable way, as well upon a hill as in the plain, and that damage to the lower proprietor of the kind complained of is something that he must protect himself against as best he may. The plaintiff says that a wall would stop the trouble. If so, it can build one upon its own land. *Dickinson* v. *Worcester*, 7 Allen, 19. *Flagg* v. *Worcester*, 13 Gray, 601, 607. *Parks* v. *Newburyport*, 10 Gray, 28. *Cassidy* v. *Old Colony Railroad*, 141 Mass. 174.

Bill dismissed.

GILES *v.* WALKER.

1890. *Law Reports, 24 Queen's Bench Division,* 656.

APPEAL from the Leicester County Court.

The defendant, a farmer, occupied land which had originally been forest land, but which had some years prior to 1883, when the defendant's occupation of it commenced, been brought into cultivation by the then occupier. The forest land prior to cultivation did not bear thistles; but immediately upon its being cultivated thistles sprang up all over it. The defendant neglected to mow the thistles periodically so as to prevent them from seeding, and in the years 1887 and 1888 there were thousands of thistles on his land in full seed. The consequence was that the thistle seeds were blown by the wind in large quantities on to the adjoining land of the plaintiff, where they took root and did damage. The plaintiff sued the defendant for such damage in the county court. The judge left to the jury the question whether the defendant in not cutting the thistles had been guilty of negligence. The jury found that he was negligent, and judgment was accordingly entered for the plaintiff. The defendant appealed.

Toller, for the defendant. The facts of this case do not establish any cause of action. The judge was wrong in leaving the question of negligence to the jury. Before a person can be charged with negligence, it must be shown that there is a duty on him to take care. But here there is no such duty. The defendant did not bring the thistles on to his land; they grew there naturally. [He was stopped by the court.]

R. Bray, for the plaintiff. If the defendant's predecessor had left the land in its original condition as forest land the thistles would never have grown. By bringing it into cultivation, and so disturbing the natural condition of things, he caused the thistles to grow, thereby creating a nuisance on the land just as much as if he had intentionally grown them. The defendant, by entering into occupation of the land with the nuisance on it, was under a duty to prevent damage from thereby accruing to his neighbor. The case resembles that of *Crowhurst* v. *Amersham Burial Board,* 4 Ex. D. 5, where the defendants were held responsible for allowing the branches of their yew trees to grow over their boundary, whereby a horse of the plaintiff, being placed at pasture in the adjoining field, ate some of the yew twigs and died.

LORD COLERIDGE, C. J. I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles, which are the natural growth of the soil. The appeal must be allowed.

LORD ESHER, M. R. I am of the same opinion.

Appeal allowed.

GALVESTON, &c., R. CO. *v.* SPINKS.

1896. 13 *Texas Civil Appeals*, 542.[1]

Williams, Associate Justice. This case is submitted upon the facts found by the court below, upon an assignment which questions the correctness of the conclusion of law based upon them. In brief, those facts are, that appellant owns in fee a strip of land upon which its railroad is laid, and on each side of which lie cultivated lands owned by appellee. Upon the land owned by appellant there stands a natural growth of tall trees which shade and injure the crops upon appellee's adjacent land, and also saps such land of its fertility. For this injury to crops and land the judgment appealed from was rendered. No act of defendant is shown beyond the construction and maintenance of its road and its omission to cut down its trees, it having removed only such portion of them as was necessary to permit the repair of its road and the operation of its trains. We know of no principle of law which authorizes the judgment. The land and the trees are the property of appellant, and it has the same right to them that appellee has to his land and crops. The exercise of one right is not an invasion of the other. If the presence of the trees impairs the productiveness of appellee's land, or if the cultivation of the latter would injure the trees, these results would constitute no wrong by one owner to the other, but would only be the incidents of their ownership. No breach of any duty owed by appellant to appellee is shown. It is not stated that the roots or the branches of the trees penetrate or overhang appellee's land. If they did, appellee had the right to remove such roots or branches as entered or overhung his land, or if damage was caused by them, it may be true that he could maintain an action for such damage. Wood on Nuisances, 112, 113, 306.

But no such case is made here either in the statement of the cause of action or in the facts found by the court. It is not shown that appellee has not kept its right of way in proper condition for the safe and proper operation of its trains, but the contrary is inferrible from the findings. Had it failed to do so, this might be a breach of the duty which it owed to those interested in the manner in which it conducted its road, but not of one due to appellee to protect his land and crops from such damage as that of which he complains. It is urged that as there is no statement of facts, we should presume that enough was shown to sustain the judgment. But the conclusions of the trial judge show affirmatively the facts upon which the judgment is rendered, and the conclusion of law based upon those facts was excepted to by appellant in the court below and is erroneous. It is not a case where there is an omission to find some fact, but one in which a ruling erroneous in law is grounded upon facts found.

Reversed and rendered.

[1] Arguments omitted. — Ed.

FISHER v. FEIGE.

1902. 137 *California*, 39.[1]

APPEAL by defendants from a judgment in favor of plaintiff.

Plaintiff is a lower riparian proprietor on a certain watercourse, and defendants are upper riparian proprietors thereon. The action was brought to recover damages in the sum of five thousand dollars for certain alleged interferences by defendants with the flow of the water in the stream, and for a perpetual injunction restraining defendants from their repetition of the alleged wrongs.

It is averred that along and adjacent to the stream as it flows through defendants' land there is a heavy growth of timber, which, before the alleged wrongful acts of defendants, protected the waters of the stream from evaporation by drying winds and the rays of the sun, and that defendants have cut and felled a large number of trees, and thus let in the sun and the wind and caused the waters to be diminished by evaporation, so that not as much flowed down on to plaintiff's land as formerly; and that they threatened to fell more of said trees in the future.

It is also averred, and found by the court, that said acts were done by defendants "solely for the purpose of injuring the plaintiff and damaging his said property, and out of spite and ill-will towards the plaintiff."

The court found that plaintiff was damaged in the sum of one cent by the alleged wrongs, for which amount judgment was rendered. By the judgment the defendants were also "perpetually enjoined" . . . "from cutting or felling the timbers and trees growing in the channel and upon the immediate banks of said stream at any point above the said lands of the plaintiff, whereby the said stream will be exposed to the rays of the sun and the waters thereof lost or materially diminished by evaporation."

Defendants appealed from the judgment.

O'Brien, O'Brien & O'Brien, for appellants.

T. B. Hutchinson and *F. E. Johnston*, for respondent.

MCFARLAND, J. [After discussing the question of motive.]

. . . Under the facts found we cannot see how the lawfulness of the acts enjoined can depend upon the motives by which they were done, or may be done in the future.

It is found that the defendants did fell trees on their lands, and threatened to fell more, the effect of which was, and would be, to let in the sun and winds, and thus increase evaporation.

. . . . . .

It is quite apparent that cutting trees upon one's own land is a law-

[1] Statement rewritten. Only so much of the case is given as relates to a single point. — ED.

ful act, which cannot be restrained because it "lets in the sun" and causes more evaporation; any incidental damage which might come to a lower riparian owner from such lawful act would clearly be *damnum absque injuria.*

. . . . . .

Judgment reversed.

TEMPLE, J., and HENSHAW, J., concurred.

LANE *v.* CONCORD.

1900. 70 *New Hampshire*, 485.[1]

CASE, for creating a nuisance to the plaintiff's injury. Trial by jury and verdict for the defendants.

The plaintiff owns a lot of land with a house upon it, in Concord. The land adjoining slopes toward the west, and, at a distance of about one hundred feet from the house, is low and wet. The owners of this land, being desirous of grading it to a higher level, gave the defendants license to dump upon it the materials collected by them in cleaning the streets and removing garbage or refuse matter placed at the sides of streets by residents, for removal. Job teamsters and other persons also dumped waste materials there. The materials thus placed upon the land consisted of sand, gravel, brush, leaves, grass, coal ashes, tin cans, stove pipe, broken earthen and glass ware, rags, old boots and shoes, hoopskirts, paper, old mattresses, decayed apples, etc. There was evidence that a dead cat was found there at one time.

Between May 1, 1897, and the date of the writ (September 15, 1899), the defendants placed a large quantity of materials upon the lot. They cleaned out the catch-basins at the sides of streets each spring and fall, and dumped upon the lot the contents of those located within an eighth of a mile of it. The surfaces of these streets are made of sand or gravel. The contents of the basins consisted of sand, gravel, leaves, and other substances washed into them from the streets. The basins are so constructed that substances heavier than water settle to the bottom, and the water flows into the sewer through a pipe extending from the side of the basin, at a point two or three feet above its bottom, in a descending line to the sewer. A portion of the contents when taken from the basin is suspended in water, forming a semi-fluid mixture. The contents when first taken out, and for five or six hours afterward, emit an odor. The defendants also dumped upon the lot materials of the kinds above mentioned; but their evidence tended to show that they did not place there any animal or vegetable matter other than brush, leaves, grass, rags, and old leather.

The jury were instructed, among other things, in substance, that the

[1] Only so much of the case is given as relates to a single point. — ED.

defendants, under the license from the owners of the land, had the same rights which the owners had in respect to placing materials upon it; that they might place any materials there they saw fit, provided they kept the materials and the products of them upon the land and did not allow the materials or anything arising from them to go upon the adjoining premises; that if it was a reasonable use of the land, in view of the rights of the owners, the plaintiff, and other adjoining owners, to place decaying vegetable and animal matter upon it, the defendants would not be liable, although gases arising from such substances went upon the plaintiff's land, but they would be liable if such use was unreasonable under all the circumstances. No exception was taken to these instructions. . . . The jury were also instructed that the unsightly appearance of the lot was not a cause for which the plaintiff was entitled to damages; that if she was not injured by something coming from the premises upon her land, — gases or something else, — she had no right to complain. To this instruction she excepted.

Eastman & Hollis and *Harry J. Brown*, for plaintiff.

Sargent, Niles & Morrill, for defendants.

Blodgett, C. J. . . . For injuries which unavoidably result from the ordinary use of property, no nuisance can arise; and as a general rule, every person has the right to subject his property to such uses as will in his judgment best subserve his interests. This rule has its exception, however, for it is doubtless true that every one is bound to make a reasonable use of his own property so as to occasion no unnecessary damage to others; but what constitutes such a use cannot be precisely defined, and must depend upon the circumstances of each case. Nevertheless, we think it may be stated as a general doctrine that, in order to constitute a nuisance from the use of one's property, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable and inconvenient. See *Campbell* v. *Seaman*, 63 N. Y. 568; 20 Am. Rep. 567, 572; *Sparhawk* v. *Railway*, 54 Pa. St. 401; *Rhodes* v. *Dunbar*, 57 Pa. St. 274; *Wahle* v. *Reinbach*, 76 Ill. 322; *Barnes* v. *Hathorn*, 54 Me. 124; *Columbus, etc. Coke Co.* v. *Freeland*, 12 Ohio St. 392; *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. Cas. 642; *Salvin* v. *Coal Co.*, L. R. 9 Ch. App. Cas. 705.

In this view of the law, as well as of the use to which the lot was subjected by the defendants and the occasion for such use, we are of opinion the jury were properly instructed that the unsightly appearance of the lot was not a cause entitling the plaintiff to damages, and that unless she was injured by gases or something else coming from the city lot on to her premises, she had no right to complain. Unless "gases or something else" did come upon her land from that lot, it is not perceived how she could have suffered any legal injury from the substances deposited thereon, for it is apparently well settled that the unsightly condition of one's premises does not of itself afford a right of

action to a more æsthetic adjoining owner. Wood Nuis. (2d ed.) 4–6, 15, 16, and authorities cited. Persons living in cities or other thickly settled communities must necessarily suffer some discomforts and annoyances from each other; but for these they are supposed to be fully compensated by the advantages incident to such communities.

Exceptions overruled.

RINDGE *v.* SARGENT.

1886. 64 *New Hampshire*, 294.

Bill in Equity, to restrain the defendant from obstructing the free and natural flow of surface-water from the plaintiff's land over and across the defendant's land. Facts found by a referee.

Lane & Dole and *Batchelder & Faulkner*, for the plaintiff.

L. Wellington and *C. B. Eddy*, for the defendant.

Carpenter, J. If the use made by the defendant of his land in obstructing the flow of the surface-water over it is to be considered by itself, independent of the relations of his land to surrounding lands, and without regard to the injury or inconvenience which the obstruction may cause to others, the referee finds that the defendant's use of his land is reasonable; but if such reasonable use is to be determined, not solely in view of the defendant's interest and convenience, but in view, also, of the interest and convenience of surrounding land-owners, he finds that the defendant's use of his land, by which the surface-water is made to set back upon, overflow, and prevent the drainage of the plaintiff's land, is unreasonable. If the use is reasonable, there is to be a decree for the defendant; if unreasonable, for the plaintiff.

The owner of the soil may put it, and the water falling, resting, or flowing upon it or percolating through it, to any use he pleases that is not injurious to another. In such case the question of the reasonableness of the use does not arise. Reasonableness or unreasonableness, in a legal sense, cannot be predicated of a use by which the rights, interest, and convenience of no one but the party exercising it are affected. A use is reasonable which does not unreasonably prejudice the rights of others. In determining the question of reasonableness, the effect of the use upon the interests of both parties, the benefits derived from it by one, the injury caused by it to the other, and all the circumstances affecting either of them, are to be considered. *Bassett* v. *Company*, 43 N. H. 569; *Hayes* v. *Waldron*, 44 N. H. 580, 584, 586; *Swett* v. *Cutts*, 50 N. H. 439, 446; *Thompson* v. *River Co.*, 58 N. H. 108, 111; *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. Cas. 642.

Decree for the plaintiff.[1]

Bingham, J., did not sit: the others concurred.

[1] As to the rules of law in other jurisdictions regarding surface-water, see authorities collected in 2 Gray's Cases on Property, 2d ed., pp. 137–155. — Ed.

LADD *v.* GRANITE STATE BRICK COMPANY.

1894. 68 *New Hampshire*, 185.

Bill in Equity, filed March 26, 1892, praying for an injunction against the manufacture of bricks near the plaintiff's dwelling. Facts found by the court. In 1890, the defendants began the manufacture of bricks on their land about seventy rods from the plaintiff's house. On a few acres of the plaintiff's land, between her house and the brick-kilns, there is a natural growth of hard pine and a small percentage of white pine. At times during the burning of brick, smoke or vapor from the kilns is carried by the wind to the plaintiff's house, causing a perceptible odor that is offensive and temporarily annoying to the plaintiff. She is sixty-six years old, and has been for many years in delicate health, with a predisposition to bronchial troubles and erysipelas. She is susceptible to irritation from atmospheric changes and sensitive to any supposed invasion of her rights. The smoke or vapor carried to her house is not such in quantity or quality as to cause serious inconvenience or perceptible injury to persons of ordinary health and temperament, but the plaintiff, in her enfeebled state and nervous condition, is troubled by it. It oppresses her breathing, causes her to cough more than usual, and has a tendency to bring out erysipelas.

The foliage or needles on some of the white pines nearest to the kilns and on the side of them next to the kilns have turned to a reddish brown color, indicating decay. This discoloration was caused by the smoke or gas from the kilns. No trees have been killed. The value of the grove as a protection to the plaintiff's dwelling from winds and storms is not affected, nor is its ornamental value seriously impaired.

During the first two years, the defendants used coal dust in their kilns, which in the process of burning generated a gas that is destructive to certain kinds of trees. In August, 1892, they discarded coal, and since that time have used nothing but wood.

The defendants' use of their property is not unreasonable to the plaintiff. The damage to them from an injunction restraining the continuance of their business would be large. The damage to the plaintiff, if any, from a continuance of the business will be small and not irreparable.

Frink & Batchelder, *William L. Foster*, and *Streeter, Walker & Chase*, for the plaintiff.

Drury & Peaslee, *Calvin Page*, and *Blackmer & Vaughan* (of Massachusetts), for the defendants.

Carpenter, J. . . . "The maxim, *Sic utere tuo ut alienum non lædas*," says Erle, J., in *Bonomi* v. *Backhouse*, E. B. & E. 622, 643, "is mere verbiage. A party may damage the property of another

where the law permits, and he may not where the law prohibits; so that the maxim can never be applied till the law is ascertained, and when it is the maxim is superfluous." The same may be said of the correlative maxim, *Qui jure suo utitur neminem lædit.* To the proper application of either, a prior determination of the legal rights of the parties in their relation to each other is essential. Equal rights are often in conflict. One's lawful use of a public highway may seriously interfere with, or for a time wholly prevent, its use by another who has an equal right to its free and unobstructed use. While one may in general put his property to any use he pleases not in itself unlawful, his neighbor has the same right to the undisturbed enjoyment of his adjoining property. The right of each is qualified by that of the other.

Livery stables, lime-kilns, brick-kilns, butchers' shops, pigsties, tallow factories, smelting works, tanneries, noisy workshops, and various other establishments useful and necessary, but productive of more or less annoyance and injury to neighboring proprietors, may be maintained in some places and not in others, although their injurious effect upon adjacent property, and upon the personal comfort of those dwelling in the vicinity, is in each case the same. What standard does the law provide by which the business conducted in one place is declared lawful and in another unlawful?

Whatever may be the law in other jurisdictions, it must be regarded as settled in this state that the test is the reasonableness or unreasonableness of the business in question under all the circumstances. The owner may put his land or other property to any use not unlawful which, in view of his own interest and that of all persons affected by it, is a reasonable use. For the consequence to others of such a use, he is not responsible. The question of reasonableness is a question of fact. *Bassett* v. *Company*, 43 N. H. 569; *Hayes* v. *Waldron*, 44 N. H. 580; *Swett* v. *Cutts*, 50 N. H. 439; *Eaton* v. *Railroad*, 51 N. H. 504, 530–533; *Brown* v. *Collins*, 53 N. H. 442, 446–448; *Holden* v. *Lake Co.*, 53 N. H. 552; *Thompson* v. *Company*, 54 N. H. 545, 556, 559; *Garland* v. *Towne*, 55 N. H. 55, 59; *Green* v. *Gilbert*, 60 N. H. 144; *Jones* v. *Aqueduct*, 62 N. H. 488; *Rindge* v. *Sargent*, 64 N. H. 294; *Graves* v. *Shattuck*, 35 N. H. 257, 265–268; *McIntire* v. *Plaisted*, 57 N. H. 606; *Lumber Co.* v. *Company*, 65 N. H. 290, 390–392; *Davis* v. *Whitney*, *ante*, p. 66.

It is found that the use made by the defendants of their land is not unreasonable to the plaintiff,— that is to say, it is not unreasonable so far as by it she is affected. It does not unreasonably interfere with or prejudice her rights. The evidence was competent and sufficient to support the finding, and it cannot be revised. By consenting to a trial by the court of the merits, the objection, that equity does not ordinarily intervene in such cases until the existence of the alleged nuisance is established at law, was waived. The case stands as if in a trial at law the jury had found against the plaintiff.

Bill dismissed.

[As to the maxim, *Sic utere tuo ut alienum non lædas.*]

"The maxim, . . . is no help to decision, as it cannot be applied till the decision is made."

Sir Wm. Erle, in *Brand* v. *H. & C. R. Co.*, L. R. 2 Qu. B. 223, p. 247.

"*Sic utere tuo ut alienum non lædas:* how can this duty be understood without first knowing the meaning of *tuum* and injury?"

2 Austin on Jurisprudence, 3d ed. 795.

"The attempt to solve these difficulties, which one meets with in ordinary law books, are merely identical propositions, and amount to nothing: e. g., *Qui jure suo utitur neminem lædit.* If by *lædit* be meant damage or evil, it is false (and inconsistent with what immediately precedes); since the exercise of a right is often accompanied with the infliction of positive evil in another. If by *lædit* be meant *injury*, the proposition amounts to this; that the exercise of a right cannot amount to a wrong: which is purely identical and tells us nothing; since the thing we want to know is 'what is right? (or what is that which I may do without wrong?); and what is wrong? (what is that which would not be an exercise of my own right, inasmuch as it would amount to a violation of a right in another?)'"

"The same observations are applicable to *Sic utere tuo ut alienum non lædas.*"

2 Austin on Jurisprudence, 3d ed. 829.

"The maxim, *Sic utere tuo ut alienum non lædas*, is iterated and reiterated in our books, and yet there is scarcely an aphorism known to the law, the true application of which is more vague and undefined. Interpreted literally it would enjoin a man against any use of his own property which in its consequences might injuriously affect the interests of others; but no such legal principle ever existed."

"While, therefore, *Sic utere tuo*, &c., may be a very good moral precept, it is utterly useless as a legal maxim. It determines no right; it defines no obligation."

Selden, J., in *Auburn, &c., Co.* v. *Douglass*, 9 New York, 444, pp. 445, 446.

"The maxim, *Sic utere tuo ut alienum non lædas*, as commonly translated (So use your own as not to injure another's), is doubtless an orthodox moral precept; and in the law, too, it finds frequent application to the use of surface and running water, and indeed generally to easements and servitudes. But strictly, even then, it can only mean, 'So use your own that you do no legal damage to another's.' Legal damage, actionable injury, results only from an unlawful act. This maxim also assumes that the injury results from an unlawful act, and paraphrased means no more than, 'Thou shalt not interfere with the legal rights of another by the commission of an unlawful act,' or 'Injury from an unlawful act is actionable.' This affords no aid in this case in determining whether the act complained of is actionable, that is, unlawful. It amounts to no more than the truism, An unlawful

act is unlawful. This is a mere begging of the question; it assumes the very point in controversy, and cannot be taken as a *ratio decidendi.*"

INGERSOLL, SP. J., in *Payne* v. *W. & A. R. Co.*, 13 Lea, Tennessee, 507, pp. 527, 528.

[As to Section 5076, Rev. Codes of North Dakota, ed. 1899: "One must so use his own rights as not to infringe on the rights of others."]

"The third maxim quoted does not mean that one must so use his own rights as not to 'damage' another. There is a wide distinction between 'damage' and 'injury.' They bear the same relation to each other as cause and effect. An 'injury,' in its legal sense, is misconduct, and 'damage' is the legal term applied to the loss resulting from misconduct. *City* v. *Voegler*, (Ind.) 2 N. E. 821. The true sense of the maxim is that one shall not so use his own property as to injure another, or, as our Code expresses it, 'infringe on the rights of another.'"

ENGERUD, J., in *Carroll* v. *Rye Township*, 13 North Dakota 458, p. 466.

CHAPTER XII.

LIABILITY FOR FIRE OR EXPLOSIVES.

DEAN *v.* McCARTY.

9 *Victoria.* 2 *Upper Canada Queen's Bench,* 448.[1]

This was an action on the case for negligently keeping fire which the defendant had kindled on his own field in order to clear his land, by reason whereof it spread to the adjoining land of the plaintiff, and destroyed his wood, fences, etc.

Plea, general issue.

It was proved at the trial, which took place at Cobourg, before Mr. Justice McLean, that the defendant was clearing his land, and had set fire to his log-heaps at a favorable time; but, a high wind springing up, the fire unfortunately spread, running through the grass, notwithstanding such efforts as could be used to stop it, and some cord-wood and rails belonging to the plaintiff were destroyed. The plaintiff's witnesses acquitted the defendant of blame, and the case was left to the jury upon the question of fact: whether the defendant had or had not acted with due care and caution in setting the fire as he did, under the circumstances; and whether he did all in his power to prevent injury to his neighbors. The jury found for the defendant.

J. Hillyard Cameron moved, last term, for a rule *nisi* for a new trial, for misdirection; contending that the act of the defendant was of such a nature as made him responsible for the consequences, as it might have been prevented, and that he was bound to protect his neighbor's property from any injurious consequences from the fire which he had kindled for purposes which were beneficial to himself. He cited *Tuberville* v. *Stamp*, 12 Modern, 152; *Vaughan* v. *Menlove*, 3 Bing. N. C. 476.

Robinson, C. J. . . . It is sought here to hold the defendant liable upon a rigorous and indiscriminating application of what is undoubtedly a legal maxim, *Sic utere tuo ut alienum non lædas.* But this maxim is rather to be applied to those cases in which a man, not under the pressure of any necessity, deliberately, and in view of the consequences, seeks an advantage to himself at the expense of a certain

[1] Part of opinion omitted. — Ed.

injury to his neighbor; as, for instance, in the use he makes of a stream of water passing through his land, which he is at liberty to apply to his own purposes, but he must not so use it as to diminish the value of the stream to his neighbor unless he has a prescriptive right. But when we come to apply the maxim to the acts of parties on other occasions, where accident has part in producing the injury, we must see that a great part of the business of life could not be carried on under the risks to which parties would then be exposed. For instance, a man has a right to drive his carriage along the highway, and it may be granted that he must in one sense exercise his right so as not to injure others, — that is, he must not intentionally injure others, nor injure them by his neglect; but if we were to hold that he must at all events take care, at his peril, that he do them no injury, then, if his horses should be frightened by a flash of lightning, and become ungovernable, he must answer, civilly at least, for all the damages they may commit, though it might be to his ruin. So, again, a ship might be riding at anchor with others, well secured, and carefully attended to by a competent crew; and yet, if by the violence of a tempest she should be driven from her anchorage against another ship, and occasion her loss and injury, it could not be held that the owners were liable, on the principle that they must at their peril so use their own ship as not to injure others. In these cases, the taking the horse into the highway and the bringing the ship to an anchor are as much the voluntary acts of the party as the kindling the fire was, in the case before us; but it is indispensable that allowance should be made for the necessity people are under for doing such acts, and that misfortune and neglect should not be confounded.

We cannot go so far as to hold that, in all such cases, whether an act has been imprudent or not must be taken to be proved by the result alone; though we cannot but feel that cases of great hardship may arise, and in which the inclination of a Court might generally be to throw the loss upon the party kindling the fire, even when there might appear no clear ground for ascribing a want of due caution to him. For example, a man may have a very valuable mill, and a neighbor having a small piece of wood adjoining to it, of trifling value compared to the mill, in the process of clearing sets fire, which, unfortunately, by a sudden rise or change of wind, spreads so as to consume the mill, in spite of all the exertion that can be used. It may be said, here is a case in which one of two innocent men must bear a serious loss, and that the misfortune would more properly fall upon the one who was a voluntary agent in setting the cause of the injury in motion, than upon him who had no share whatever in producing it. And we might perhaps be right in believing that it would have been possible for the party clearing the land to have done it at such a time, and in such a manner, as would certainly have prevented the accident occurring. Still, I apprehend that such a case must go to the jury, like all other cases of the kind, upon the question of negligence. If

the principle is a sound one, it must be applied throughout; though indeed it might seem reasonable, where very valuable property might be endangered, to apply an extraordinary degree of caution and diligence; but that consideration would only affect the determination of the jury upon the fact of what was reasonable care under the circumstances. We must consider, on the other hand, in examining the soundness of what we assume to be the principle, what would be the state of things if the person kindling the fire were to be inevitably and in all cases liable for the consequences. It is not very long since this country was altogether a wilderness, as by far the greater part still is. Till the land is cleared, it can produce nothing, and the burning of the wood upon the ground is a necessary part of the operation of clearing. To hold that what is so indispensable, not merely to individual interests, but to the public good, must be done wholly at the risk of the party doing it, without allowance for any casualties which the act of God may occasion, and which no human care could certainly prevent, would be to depart from a principle which, in other business of mankind, is plainly settled and always upheld. If it could be shown that this business of clearing land could, by means which we can suppose to be within the reach of those employed in it, be done at a time, or in a manner, that would make it wholly independent of any accident beyond the control of the party, then perhaps the bare fact of not having taken those certain means might be held to constitute negligence; in which case, the liability for damages would always, as a matter of course, follow the injury. But as we cannot, I think, venture to hold that there are any certain means of avoiding such accidents, it must, in such case, be a question of fact for the jury whether the defendant has any negligence to answer for or not. In Comyns's Digest, Tit. *Action upon the Case for Negligence*, A, 6, the law is thus laid down: "So, an action upon the case lies upon the general custom of the nation (in other words, by the common law), against the master of a house, if a fire be kindled there and consume the house or goods of another." "So, if a fire be kindled in a yard or close to burn stubble, and by negligence it burns corn, etc., in an adjoining close." As to the first part of what is here said, applying to accidental fires in houses, we know that the law has, by act of Parliament, been placed on a different footing, 6 Anne, c. 31; 14 Geo. III., c. 78, §§ 85, 86, and that it has been thought reasonable to exempt persons from answering in damages for injuries occasioned to others in such cases, even where there has been a want of due care.[1] But as to the latter part of the doctrine laid down, but which applies to the case of a fire spreading which has been kindled in a field to burn stubble, I do not feel that the law is anywhere denied to be such as Chief Baron Comyns assumes it to be. It has not, in this respect, been altered by statute, nor does it seem to have been, in more modern authorities, laid down

[1] But see *Filliter* v. *Phippard*, 11 Q. B. 347. — Ed.

differently; neither has it been made a question whether this principle, thus laid down, had been carefully considered and correctly stated. We see, then, that it is when by negligence the fire spreads to an adjoining close that an action lies. And the same very learned author adds: "So, it lies not if it appears that a fire lighted for the burning of stubble, etc., by a sudden wind, or other inevitable accident, without the fault of the defendant, or his servants, burns the corn of another." Though there are many other cases which would supply reasoning from analogy in support of the principle thus laid down, yet the single case relied upon by the Chief Baron is that of *Tuberville* v. *Stamp*, reported by himself, Com. 32, Lord Raymond, Salkeld, Holt, and in several other reports: 1 Salk. 13; 2 Salk. 726; Comb. 459; Skin. 681; Carth. 425; 12 Modern, 152; 1 Ld. Raym. 264. And this case is certainly expressly to the point, and warrants the doctrine laid down; and, unless it can be shown to have been overruled, it must govern in this case. It is reported in 12 Modern, 152, in a clear and concise manner, and stripped of anything extraneous to the main point which is the question here. On that account only, I refer to the case as it is there given; for, if the report differed materially in its effect from the account of the case given by the other reporters, we should doubtless feel more safe in relying upon some of them. The action was upon the case for negligently keeping defendant's fire, and the declaration charged that defendant so carelessly kept the fire in his close that it burut the plaintiff's heath in his field. After verdict for the plaintiff, it was moved, in arrest of judgment, that the action would only lie on the special circumstances of the case for actual negligence, whereas here it was grounded on a supposed general custom of the nation; and, as I understand the case, the objection intended to be urged was that the plaintiff, by so stating his grievances, relied upon the custom of the nation as supplying the presumption of negligence, in such cases, from the mere occurrence of the accident, and when there might, in fact, have been no negligence; in short, that it placed the defendant on the same footing, in that respect, as a common carrier. Turton, J., observed: "There is a difference between fire in a man's house and in the field; in some counties it is a necessary part of husbandry to make fire in the ground, and some unavoidable accident may carry it into a neighbor's ground and do injury there; and this fire not being so properly in his custody as the fire in his house, I think this is not actionable as it is laid." But by Holt, C. J., and the other judges: "Every man must so use his own as not to injure another. The law is general; the fire which a man makes in his fields is as much his fire as the fire in his house; it is made on his grounds with his materials, and by his order, and he must at his peril take care that it does not through his neglect injure his neighbor; if he kindle it at a proper time and place, and the violence of the wind carry it into his neighbor's ground, and prejudice him, this is fit to be given in evidence. But now here, it is found to have been by his negligence, and it is the same as if it had been in his house." It

was after verdict, and negligence was charged in the declaration; and therefore they held they could not arrest the judgment. This contains all the doctrine under consideration. We cannot distinguish the case from the one before us. The Court did not then hold that the person lighting the fire must take care at all events that it does not injure his neighbor, but that he must take care that it shall not do so "through his neglect." And this doctrine, and the authority of this case, was most fully recognized in the recent case of *Vaughan* v. *Menlove*, 3 Bing. N. C. 476. What would be neglect, and what not, under the circumstances of each case, may sometimes give rise to nice questions, some of which may be considered not to rest wholly with the jury, — such as the necessity and sufficiency of notice to the parties whose lands adjoin, of the intention to set fire. But, in this case, the objection taken is the broad one that the defendants must be liable at all events, — a doctrine which cannot, in our opinion, be maintained. The verdict is not moved against as being against the weight of evidence; and if it were, we should require a strong case, when the verdict is for the defendant, to grant a second trial in such an action. We ought not, indeed, do it unless we were clearly of opinion that the jury, upon the evidence before them, ought to have found a verdict for the other party. *Rule refused.*[1]

BACHELDER ET AL *v.* HEAGAN.

1840. 18 *Maine*, 32.[2]

THE action was trespass on the case, to recover damages, alleged to have been done to the plaintiffs' land, and to the fences and growth thereon, by the negligence of the defendant in setting a fire on his own land, near to the land of the plaintiffs, and in not carefully keeping the same.

At the trial before Emery, J., evidence was introduced by both parties. The counsel for the plaintiffs requested the judge to instruct the jury, that the plaintiffs were entitled to a verdict, if they were satisfied from the evidence, that the damage was occasioned by the defendant's fire, unless he satisfied them that it was not through negligence or mismanagement on his part. The judge instructed the jury, that the burthen of proof was upon the plaintiffs to satisfy them, beyond a reasonable doubt, that the damage was occasioned by the defendant's fire, and through the carelessness and negligence of the defendant in keeping the same; such carelessness and negligence being alleged in the plaintiffs' declaration, and it not being contended by the plaintiffs that the fire was wilfully and maliciously set by the de-

[1] In some States there are statutes imposing greater liabilities than would exist under the above decision upon persons setting fires in woods or upon land. See 2 Shearman & Redfield on Negligence, 4th ed. s. 671. — ED.

[2] Citations of counsel omitted. — ED.

fendant. On the return of a verdict for the defendant, the plaintiffs filed exceptions to the ruling of the judge.

Kelly, for plaintiffs.

W. G. Crosby, for defendant.

The opinion of the Court was by

WESTON, C. J. By the ancient common law, or custom of the realm, if a house took fire, the owner was held answerable for any injury thereby occasioned to others. This was probably founded upon some presumed negligence or carelessness, not susceptible of proof. The hardship of this rule was corrected by the statute of 6 Ann. c. 31, which exempted the owner from liability, where the fire was occasioned by accident. The rule does not appear to have been applied to the owner of a field, where a fire may have been kindled. It may frequently be necessary to burn stubble or other matter which encumbers the ground. It is a lawful act, unless kindled at an improper time or carelessly managed. Baron Comyns states, that an action of the case lies, at common law, against the owner of a house which takes fire, by which another is injured, and adds, "so if a fire be kindled in a yard or close, to burn stubble, and by negligence it burns corn in an adjoining close." Com. Dig. *Action of the Case for Negligence*, A. 6.

In *Clark* v. *Foot*, 8 Johns. R. 421, it was held, that if A. sets fire to his own fallow ground, as he may lawfully do, which communicates to and fires the woodland of B., his neighbor, no action lies against A., unless there was some negligence or misconduct in him or his servants. And this is a fair illustration of the common law, upon which the action depends. Negligence or misconduct is the gist of the action. And this must be proved. In certain cases, as in actions against innkeepers and common carriers, it is presumed, by the policy of the law, where property is lost which is confided to their care. But in ordinary cases, of which the one before us is not an exception, where the action depends on negligence, the burthen of proof is upon the plaintiff. This is common learning, and applies to all affirmative averments necessary to maintain an action. The defendant's fire was lawfully kindled on his own land. It is an element appropriated to many valuable and useful purposes; but which may become destructive from causes not subject to human control. Hence the fact, that an injury has been done to others, is not in itself evidence of negligence. The party who avers the fact is bound to satisfy the jury upon this point, before he can be entitled to a verdict. In our opinion, the direction of the presiding judge was correct, as to the burthen of the proof. *Judgment on the verdict.*[1]

[1] In actions against railroad companies, there is a conflict of authority upon the question whether proof that the fire issued from the engine casts upon the company the burden of disproving negligence. In some localities there are statutes expressly imposing this burden upon the company. See Pierce on Railroads, 437–438; 2 Shearman & Redfield on Negligence, 4th ed. s. 676.

HEEG *v.* LICHT.

1880. 80 *New York*, 579.

APPEAL from judgment of the General Term of the Supreme Court in the Second Judicial Department, affirming a judgment in favor of defendant, entered upon a verdict. (Reported below, 16 Hun, 257.)

This action was brought to recover damages for injuries to plaintiff's buildings, alleged to have been caused by the explosion of a powder-magazine on the premises of defendant; also to restrain the defendant from manufacturing and storing upon his premises fire-works or other explosive substances.

The facts are sufficiently stated in the opinion.

Philip S. Crooke, for appellant.

Benjamin F. Downing, for respondent.

MILLER, J. This action is sought to be maintained upon the ground that the manufacturing and storing of fire-works, and the use and keeping of materials of a dangerous and explosive character for that purpose, constituted a private nuisance for which the defendant was liable to respond in damages, without regard to the question whether he was chargeable with carelessness or negligence. The defendant had constructed a powder magazine upon his premises, with the usual safeguards, in which he kept stored a quantity of powder which, without any apparent cause, exploded and caused the injury complained of. The judge upon the trial charged the jury that they must find for the defendant, unless they found that the defendant carelessly and negligently kept the gunpowder upon his premises. The judge refused to charge that the powder magazine was dangerous in itself to plaintiff and his property; and was a private nuisance, and the defendant was liable to the plaintiff whether it was carelessly kept or not; and the plaintiff duly excepted to the charge and the refusal to charge.

We think that the charge made was erroneous and not warranted by the facts presented upon the trial. The defendant had erected a building and stored materials therein, which from their character were liable to and actually did explode, causing injury to the plaintiff. The fact that the explosion took place tends to establish that the magazine was dangerous and liable to cause damage to the property of persons residing in the vicinity. The locality [legality?] of works of this description must depend upon the neighborhood in which they are situated. In a city, with buildings immediately contiguous and persons constantly passing, there could be no question that such an erection would be unlawful and unauthorized. An explosion under such circumstances, independent of any municipal regulations, would render the owner amenable for all damages arising therefrom. That the defendant's establishment was outside of the territorial limits of a city does not relieve the owner from responsibility or alter the case, if the

dangerous erection was in close contiguity with dwelling-houses or buildings which might be injured or destroyed in case of an explosion. The fact that the magazine was liable to such a contingency, which could not be guarded against or averted by the greatest degree of care and vigilance, evinces its dangerous character, and might in some localities render it a private nuisance. In such a case the rule which exonerates a party engaged in a lawful business, when free from negligence, has no application. The keeping or manufacturing of gunpowder or of fire-works does not necessarily constitute a nuisance *per se*. That depends upon the locality, the quantity, and the surrounding circumstances, and not entirely upon the degree of care used. In the case at bar it should have been left for the jury to determine whether from the dangerous character of the defendant's business, the proximity to other buildings, and all the facts proved upon the trial, the defendant was chargeable with maintaining a private nuisance and answerable for the damages arising from the explosion.

A private nuisance is defined to be anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. 3 Bl. Com. 216. Any unwarrantable, unreasonable, or unlawful use by a person of his own property, real or personal, to the injury of another, comes within the definition stated, and renders the owner or possessor liable for all damages arising from such use. Wood's Law of Nuis., § 1, and authorities cited. The cases which are regarded as private nuisances are numerous, and the books are full of decisions holding the parties answerable for the injuries which result from their being maintained. The rule is of universal application that while a man may prosecute such business as he chooses on his own premises, he has no right to erect and maintain a nuisance to the injury of an adjoining proprietor or of his neighbors, even in the pursuit of a lawful trade. *Aldred's Case*, 9 Coke, 58; *Brady* v. *Weeks*, 3 Barb. 159; *Dubois* v. *Budlong*, 15 Abb. 445; *Wier's Appeal*, 74 Penn. St. 230.

While a class of the reported cases relates to the prosecution of a legitimate business, which of itself produces inconvenience and injury to others, another class refers to acts done on the premises of the owner which are of themselves dangerous to the property and the persons of others who may reside in the vicinity, or who may by chance be passing along or in the neighborhood of the same. Of the former class are cases of slaughter-houses, fat and offal boiling establishments, hog-styes or tallow manufactories, in or near a city, which are offensive to the senses and render the enjoyment of life and property uncomfortable. *Catlin* v. *Valentine*, 9 Pai. 575; *Brady* v. *Weeks*, 3 Barb. 157; *Dubois* v. *Budlong*, 15 Abb. 445; *Rex* v. *White*, 1 Burr. 337; 2 Bl. Com. 215; *Farrand* v. *Marshall*, 21 Barb. 421. It is not necessary in these cases that the noxious trade or business should endanger the health of the neighborhood. So also the use of premises in a manner which causes a noise so continuous and excessive as to produce serious annoyance, or vapors or noxious smells; *Tipping* v.

St. Helen's Smelting Co., 4 B. & S. (Q. B.) 608; *Brill* v. *Flagler*, 23 Wend. 354; *Pickard* v. *Collins*, 23 Barb. 444; Wood's Law of Nuis., § 5; or the burning of a brick kiln, from which gases escape which injure the trees of persons in the neighborhood. *Campbell* v. *Seaman*, 63 N. Y. 568; s. c., 20 Am. Rep. 567. Of the latter class also are those where the owner blasts rocks with gunpowder, and the fragments are liable to be thrown on the premises and injure the adjoining dwelling-houses, or the owner or persons there being, or where persons travelling may be injured by such use. *Hay* v. *Cohoes Co.*, 3 Barb. 42; s. c., 2 N. Y. 159; *Tremain* v. *Cohoes Co.*, 2 N. Y. 163; *Pixley* v. *Clark*, 35 id. 523.

Most of the cases cited rest upon the maxim *sic utere tuo*, etc., and where the right to the undisturbed possession and enjoyment of property comes in conflict with the rights of others, that it is better, as a matter of public policy, that a single individual should surrender the use of his land for especial purposes injurious to his neighbor or to others, than that the latter should be deprived of the use of their property altogether, or be subjected to great danger, loss, and injury, which might result if the rights of the former were without any restriction or restraint.

The keeping of gunpowder or other materials in a place, or under circumstances, where it would be liable, in case of explosion, to injure the dwelling-houses or the persons of those residing in close proximity, we think, rests upon the same principle, and is governed by the same general rules. An individual has no more right to keep a magazine of powder upon his premises, which is dangerous, to the detriment of his neighbor, than he is authorized to engage in any other business which may occasion serious consequences.

The counsel for the defendant relies upon the case of *People* v. *Sands*, 1 Johns. 78; 3 Am. Dec. 296, to sustain the position that the defendant's business was neither a public nor a private nuisance. That was an indictment for keeping a quantity of gunpowder near dwelling-houses and near a public street; and it was held (Spencer, J., dissenting), that the fact as charged did not amount to a nuisance, and that it should have been alleged to have been negligently and improvidently kept. It will be seen that the case was disposed of upon the form of the indictment, and while it may well be that an allegation of negligence is necessary where an indictment is for a public nuisance, it by no means follows that negligence is essential in a private action to recover damages for an alleged nuisance. In *Myers* v. *Malcolm*, 6 Hill, 292, it was held that the act of keeping a large quantity of gunpowder insufficiently secured near other buildings, thereby endangering the lives of persons residing in the vicinity, amounted to a public nuisance, and an action would lie for damages where an explosion occurred causing injury. Nelson, C. J., citing *People* v. *Sands*, *supra*, says: "Upon the principle that nothing will be intended or inferred to support an indictment, the Court said, for aught they could

see, the house may have been one built and secured for the purpose of keeping powder in such a way as not to expose the neighborhood;" and he cites several authorities which uphold the doctrine that where gunpowder is kept in such a place as is dangerous to the inhabitants or passengers, it will be regarded as a nuisance. The case of *People* v. *Sands* is not therefore controlling upon the question of negligence.

Fillo v. *Jones*, 2 Abb. Ct. Ap. Dec. 121, is also relied upon, but does not sustain the doctrine contended for; and it is there held that an action for damages caused by the explosion of fire-works may be maintained upon the theory that the defendant was guilty of a wrongful and unlawful act, or of default, in keeping them at the place they were kept, because they were liable to spontaneous combustion and explosion, and thus endangered the lives of persons in their vicinity, and that the injury was occasioned by such spontaneous combustion and explosion.

It is apparent that negligence alone in the keeping of gunpowder is not controlling, and that the danger arising from the locality where the fire-works or gunpowder are kept, is to be taken into consideration in maintaining an action of this character. We think that the request to charge was too broad, and properly refused. The charge however should have been in conformity with the rule herein laid down, and for the error of the judge in the charge, the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur. *Judgment reversed.*

BRADFORD GLYCERINE CO., Plfs. in Error, *v.* ST. MARY'S WOOLLEN MFG. CO., Defendants in Error.

1899. 60 *Ohio State*, 560.[1]

Bradbury, C. J. The cause was submitted to the court of common pleas on the following agreed statement of facts: —

"It is hereby stipulated that this case will be submitted to the court upon the following statement of facts as the evidence in this case: —

"Plaintiff is a corporation organized under the laws of Ohio, and the owner of real estate whereon buildings are erected in the village of St. Marys, Auglaize County, Ohio, and was such at all times stated in the petition filed in this action.

"The defendant is a partnership organized for the purpose of doing business in the State of Ohio and owning property therein.

"On or about January 25, A. D. 1896, the defendant was the owner of a magazine and contents containing about fifty quarts of nitroglycerine used by the defendant in its business of manufacturing, storing and vending nitroglycerine, which magazine was situated on a tract of

[1] Arguments omitted. — Ed.

land belonging to one W. G. Kishler, and situated something over a mile west of the buildings so owned by the plaintiff in St. Marys, Ohio, and situated about one-fourth (¼) of a mile distant from the corporation line of the village of St. Marys, Auglaize County, Ohio.

"That on or about said 25th day of January, A. D., 1896, while one of the defendant's servants was upon the premises upon which said magazine was located engaged in transferring about seven hundred and fifty (750) quarts of nitroglycerine from a wagon loaded with same to said magazine, the said nitroglycerine stored therein, and also the same upon the wagon aforesaid, from some cause unknown to said defendant, exploded with great force and concussion causing vibrations in the atmosphere sufficient in power and violence to break, shatter and destroy three (3) plate glass and three (3) common glass in the buildings owned by the plaintiffs aforesaid of the value of two hundred and forty-four dollars and ten cents ($244.10) by reason of which explosion and the breakage of said glass the plaintiffs were injured and damaged to the extent aforesaid.

"That nitroglycerine is a dangerous substance and likely to explode. That demand of payment of said sum has been made by the plaintiff to the defendant and payment thereof has been refused."

This agreed statement of facts does not show that the plaintiff in error violated any statute of the state or was in any degree negligent in handling or storing the explosive substance involved. It was nitroglycerine, a well-known and highly explosive agency, which the agreed statement of facts shows "is a dangerous substance and likely to explode." Is one who brings upon his own premises such agency liable for damages caused by its exploding, although such owner is not chargeable with either want of care or an unlawful act in connection with the casualty? This exact question has not heretofore been considered by this court, although a number of cases have been decided by the court that bear a general resemblance to it. *Gas Fuel Co.* v. *Andrews*, 50 Ohio St. 695; *Defiance Water Co.* v. *Olinger*, 54 Ohio St. 532; *Tiffin* v. *McCormick*, 34 Ohio St. 638. The tendency of these cases is towards holding the parties charged with the management of dangerous substances to a strict liability. In *Tiffin* v. *McCormick*, 34 Ohio St. 638, this court held: "Where the owner of a stone quarry, by blasting with gunpowder, destroys the buildings of an adjoining land owner, it is no defence to show that ordinary care was exercised in the manner in which the quarry was worked." And the same view of the liability of one who by blasting rocks cast fragments thereof against the house of another, was taken by the Court of Appeals of New York in the cases of *Hay* v. *The Cohoes Co.*, 2d N. Y. 159, and *Tremain* v. *The Cohoes Co.*, Ib. 163. The court in the first case decided that: "The defendants, a corporation, dug a canal upon their own land for the purposes authorized by their charter. In so doing it was necessary to blast rocks with gunpowder, and the fragments were thrown against and injured the plaintiff's dwelling upon lands adjoining. *Held*, that the

defendants were liable for the injury, although no negligence or want of skill in executing the work was alleged or proved." And in the second case that: "The defendants dug a canal upon their own land, and in executing the work blasted the rocks so as to cast the fragments against the plaintiff's house on contiguous lands. *Held*, in an action on the case brought to recover damages for the injury, that evidence to show the work done in the most careful manner was inadmissible, there being no claim to recover exemplary damages, and the jury having been instructed on the trial to render their verdict for actual damages only."

Counsel for plaintiff in error contend that in respect of the matter under consideration the analogy between the act of blasting rock on one's premises and storing a dangerous explosive thereon is not close. In the one case the damage is caused by fragments of rock being hurled upon or against the property injured, while in the other case the damage is caused by violent atmospheric vibrations from the explosion. If, however, the explosion caused fragments of the building wherein the explosive material was stored, or other solid substance, to be thrown against the property injured, thereby producing damage, the analogy might be more easily perceived. True it might be said that in the one case the party to be charged was actively engaged in the work that caused the injury, while in the other case he was simply using the premises to store the dangerous substance, not intending that it should explode. These distinctions, however, do not seem to be material. The right of the owner of a stone quarry to blast rock therefrom where that is necessary to a profitable use of his property, or the right of one to make an excavation of any kind on his own property where blasting is a proper and usual mode to accomplish the owner's purpose, would seem to be of as high and perfect a character as is the right of an owner to use his premises as a storehouse for explosive substances. Upon what principle should an owner of property hold it subject to the right of another to store on his own premises adjacent to it nitroglycerine, but not subject to the right of that other to blast rock? If one may store nitroglycerine on his own premises and not be liable to adjacent property for damages caused by its exploding unless he has been negligent, while in the case of the owner of the quarry the latter is liable for an injury to an adjacent property resulting from blasting, although free from negligence, then it is plain that the adjacent proprietor holds his property in the one case subject to the right of his neighbor to store a dangerous explosive, but not to the right of his neighbor to blast rock. In the first supposed case, the liability grows, not out of the storing of the dangerous explosive, but out of the negligence of the person storing it, while in the last supposed case, the liability springs from the manner in which the property is used, *i. e.*, the blasting, and negligence need not be shown. If in the latter instance the party blasting is liable for injuries that resulted from his act, however careful he may have been, the reasons for absolving the

former from liability, unless he has been negligent, are not apparent. The blasting doubtless is a menace to adjacent property, but so is the storing of a highly explosive substance.

In this case the premises on which the explosive substance was stored and the premises on which the building stood that was injured do not appear to have been adjacent. They were a mile apart, and for anything that appears in the record, many parcels of real estate owned by third persons may have intervened. That, however, does not seem to be material either. One who in blasting rock should cast fragments across a strip of adjacent land owned by a third person against the windows of a more remote proprietor would hardly be heard to say in defence of his act that the property injured was not adjacent. Whatever duty he owed to his neighbor extended equally to all who might fall within the lines of danger. So it would seem that in the case of explosives, the right of all within the circle of danger should be equal, irrespective of whether the property injured was adjacent to the premises upon which the material was stored.

The liability of one who for his own purpose brings upon his own premises substances dangerous to others, if not kept under control, was exhaustively discussed by the judges of England in the case of *Fletcher* v. *Rylands*, 1 Exch. L. R. 265, and afterwards on a review of the case in the House of Lords, L. R. 3, H. L. 330.

[After quoting from the opinions of Blackburn, J., and Lord Cranworth.]

The doctrine in this case (*Rylands* v. *Fletcher*, *supra*) has not been accepted by some of the courts of this country. *Marshall* v. *Welwood*, 38 N. J. L. 339; *Swett* v. *Cutts*, 50 N. H. 439; *Pennsylvania Coal Co.* v. *Sanderson*, 113 Pa. St. 121; *Losee* v. *Buchanan*, 51 N. Y. 476; but has been approved in *Shipley* v. *Fifty Associates*, 106 Mass. 194; *Gorham* v. *Gross*, 125 Mass. 232; *Meors* v. *Doll*, 135 Mass. 510; *Cahill* v. *Eastman*, 18 Minn. 324.

In the case above cited from New York, *Losee* v. *Buchanan*, 51 N. Y. 476, and that from New Jersey, *Marshall* v. *Welwood*, 38 N. J. L. 339, a casualty occurred from an explosion of steam boilers.

To my mind the analogy between the act of storing so highly explosive and dangerous an agency as nitroglycerine on one's premises and that of conducting a business thereon, which requires for its successful operation the use of steam, is not complete, although each is an explosive. Doubtless both are dangerous agencies, when control over them is lost. The use of steam has, however, so generally been employed in every productive industry that every owner of real property may reasonably be held to contemplate the contingency of its being employed upon adjacent premises, and to enjoy his property subject to that risk. In a great city like New York or Chicago, where numerous and varied industries are conducted, there are doubtless many thousands of places where steam is employed. The entire population of such a city is interested and most of them directly or indi-

rectly benefited by these industries. Large numbers of them labor by day in factories where steam furnishes the motive power, and many of them sleep at night in buildings containing engines in active operation. The modern steam boiler and engine cannot be said to be such a menace to property and human life as to constitute a nuisance *per se*. They cannot as such be driven from the centres of population. Not so, however, with gunpowder and nitroglycerine. These latter agencies on account of their dangerous character may be, and usually, if not universally, are driven into the suburbs of towns and cities, remote from human habitations and valuable structures. Under the circumstances that surround the productive arts and industries of to-day a modification of the strict rule of liability in favor of those who employ steam in such arts or industries, may not be inconsistent with its assertion against those who store gunpowder and nitroglycerine, or blast rocks adjacent to the property of others. That public policy which seeks to secure the welfare of the many may demand such modification.

Whether upon such grounds or for any other reasons such a modification of the rule should obtain in the case for the use of steam is not, of course, before the court, and the question is only considered in this brief way to show that there may be no irreconcilable conflict between the cases that have absolved the owners of boilers from liability for the consequences of an explosion occurring without their fault, and the conclusions reached by us in the case under consideration. Doubtless gunpowder, nitroglycerine and other dangerous explosives are useful agencies in many industries, as well as steam, but conceding that in the case of steam boilers the extensive and varied uses to which steam is devoted, the comparatively slight danger arising from its use, require on principles of public policy, which regards the interests of the great body of the people, that every owner of real property should be held to possess it subject to the right of his neighbor to erect a manufactory and employ steam on adjacent premises, yet it does not necessarily follow that such owner should possess his property also subject to the right of his neighbor to erect a powder or nitroglycerine magazine in his vicinity.

The existence of a manufacturing establishment, although it employ steam as a motive power, may and doubtless is in many instances a positive benefit to real property in its vicinity, and instead of diminishing may enhance its value, while on the contrary, the erection and use of a nitroglycerine magazine could have no other than a disastrous effect on the value of all real property in its vicinity. We think, therefore, the right to maintain the former may be placed upon grounds that cannot apply to the latter. The general doctrine upon the subject stated in *Fletcher* v. *Rylands*, *supra*, seems to be just and fair in its general operation. The syllabus of that case, as announced by the House of Lords, L. R. 3, H. L. 330, seems to recognize a distinction in this respect between an ordinary and an extraordinary use of his premises by their owner, and had that learned tribunal then

had before it a case where damages were sought on account of injuries resulting from an explosion of a steam boiler in a manufacturing establishment, it might have denied the liability in the absence of proof of negligence, on the ground that the owner was using his premises in an ordinary manner.

But whatever might have been done by the House of Lords in the case supposed, we are of the opinion that the storing of nitroglycerine should be deemed to be an extraordinary and unusual use of property, and we can see no principle upon which an exception to the general doctrine laid down in *Fletcher* v. *Rylands*, *supra*, can be held to exist in favor of one who stores upon his own premises that or any other dangerous explosive.

Judgment affirmed.

Shauck, J., dissents.

DILWORTH'S APPEAL.

1879. 91 *Pennsylvania State*, 247.[1]

Appeal from Court of Common Pleas, No. 2, of Allegheny County.

Bill in equity by Robinson and forty-seven others against Dilworth, to restrain Dilworth from erecting a powder magazine upon his lot in Penn Township, Allegheny County. The case was referred to a master, who recommended that an injunction should be refused and the bill dismissed. The facts are set forth in the opinion of this court. The court below thought that the public interest would be subserved by refusing the injunction; but in deference to the authority of Wier's Appeal, 24 P. F. Smith, 230, a majority of the court entered a *pro forma* decree for an injunction. Appeal was taken to the Supreme Court.

M. W. Acheson and *Bruce & Negley*, for appellant.

Barton & Sons, for appellees.

Trunkey, J. [After stating general principles and quoting from the statement of the facts in Wier's Appeal.]

After a careful revision of the master's report by the court below, the facts found in this case, and which are well sustained by proof, are as follows: This magazine has been located so as to endanger as few persons and as little property as possible, and yet be reasonably accessible as a point of supply and distribution; it is more remote from population than the magazines generally in use throughout the United States, and it is doubtful if a better location could be made in Allegheny County. It is situated about two miles from East Liberty, the nearest closely built-up district, and is separated therefrom by intervening hills and ravines. It is in a sparsely settled locality, for

[1] Only part of case is given. Argument omitted. — Ed.

the vicinity of a city, and land near it has not been, nor is it likely to be for some years, in demand for building purposes. That portion of Lincoln Avenue which terminates at a point five hundred feet from the magazine is very little travelled, very few people travel it within considerable distance of its terminus, having no occasion to do so; it was the wildest of the many absurd enterprises undertaken in Pittsburgh to carry city improvements into wild rural regions, expecting population to rapidly follow. The other public road, passing within twenty-two feet of the magazine, has for some time been almost abandoned by the people in the vicinity, and is used by about three farmers. The magazine is so situated that the force of an explosion would be down the ravine and away from the road. The greater distance of this magazine from a borough, or closely built-up district, the absence of demand of land for building purposes, and the unlikelihood of such demand in the vicinity, the little travel on the public road which passes near it, and the ravine opening from the road, are the chief points wherein this case differs from Wier's Appeal. The dwellings and families near the magazine number about the same in one as the other. None will deny that the law protects the small and cheap home as it does the large and costly mansion, and the rights of a tenant are as sacred as those of his landlord. But it is equally undeniable that if a tenant hold by lease at will, or by month, and his landlord grants that a lawful and necessary, yet offensive or dangerous factory or magazine may be erected, the tenant has not a right of action for its prevention. If such structure were placed near tenant houses occupied by miners, where the mines are likely to be worked for considerable time, it would be a material fact to be weighed with others — almost of like weight as if the houses were owned by the occupants. Here the mine is nearly exhausted, a fact to be considered in reference to the probable increase of population in the neighborhood.

It was urged that the location being only two hundred and fifty-five feet from the boundary line of Pittsburgh, and five hundred feet from the end of Lincoln Avenue, is dangerous to life and property in the city. The facts, as we have seen, are that that end of the avenue is very little travelled, and is remote from the population of the city; and, without question, "the region of country in which the magazine is located is wild and broken as to its general surface, it is traversed by numerous ravines and hills, and altogether possesses a romantic and secluded aspect." It is the real character of the location, with its surroundings, which determines its fitness, and not a city line two miles from city life, nor the unused and useless part of a graded and paved street extended beyond the visible city.

Confessedly, the demand for and consumption of powder in Pittsburgh and vicinity are very great, and it is indispensable in carrying on important branches of industry, and it would be inimical to the business interests of the community to trammel the sale of it with unnecessary restrictions and burdens. Besides the magazine at the

United States Arsenal there are no others in Allegheny County, except those of a single company, and the Dilworth. In view of the whole case the master, and one of the judges of the Common Pleas, thought the injunction should be refused. The majority of the court, in a considerate opinion, concluded that the public interest would be subserved by refusing the injunction, and that the complainants were not entitled to an injunction, but for the ruling in Wier's Appeal, on the authority of which they felt constrained to grant it. A decree was entered, with direction that it would not be enforced until the defendant could be heard on appeal. We fully agree with the court below, except that we do not think the principles in Wier's Appeal, applied to the facts in this case, require an injunction to be granted.

Decree reversed. Bill dismissed.

JAGGARD, J., IN GOULD *v.* WINONA GAS COMPANY.

1907. 100 *Minnesota*, 258, pp. 260, 261, 264.

JAGGARD, J. [After citing Minnesota decisions which adopt the principle of *Rylands* v. *Fletcher*, L. R. 3 H. L. 330.]

(2) With respect to the responsibility for damage caused by the escape of gas, however, every one of the many American authorities which have been called to our attention, or which we have been able to find after a protracted search, determines the common-law liability in such a case upon the principles of negligence applicable to the custody of a dangerous instrumentality. 1 Thompson, Neg. 719. In *Gas Co.* v. *Andrews*, 50 Oh. St. 695, 35 N. E. 1059, 29 L. R. A. 337, the absolute duty of keeping natural gas under control was imposed by a specific statute. The same conclusion has been reached indifferently in those jurisdictions in which the doctrine of insurance of safety has been accepted, as in Massachusetts (*Holly* v. *Boston*, 8 Gray, 123, 69 Am. Dec. 233; *Flint* v. *Gloucester*, 9 Allen, 552; *Bartlett* v. *Boston*, 117 Mass. 533, 19 Am. 421; *Hutchinson* v. *Boston*, 122 Mass. 219; *Carmody* v. *Boston*, 162 Mass. 539, 39 N. E. 184; *Ferguson* v. *Boston*, 170 Mass. 182, 49 N. E. 115), and in those in which it has been rejected, as in New York (*Lee* v. *Troy*, 98 N. Y. 115; *Donahue* v. *Keystone*, 181 N. Y. 313, 73 N. E. 1108, 70 L. R. A. 761, 106 Am. St. 549, which involved the destruction of trees; *Schmeer* v. *Gas*, 147 N. Y. 529, 540, 42 N. E. 202, 30 L. R. A. 653). The relevant decisions will be found gathered in 14 Am. & Eng. Enc. (2d ed.) 936, in the elaborate notes to *Gas* v. *Andrews*, 29 L. R. A. 337, in chapter 29, Thornton Oil and Gas, in chapter 17, Donahue, Pet. & Gas, and in 5 Current Law, 1586. It is true that in most of these cases it has been assumed that the liability rested on negligence only, as in *Hansen* v. *St. Paul Gaslight Co.*, 82 Minn. 84, 84 N. W. 727, 88 Minn. 86, 92 N. W. 510; but the universal trend of opinion is none the less clear nor significant.

The law of negligence has also been applied to similar cases of damage caused by electricity (*Denver* v. *Lawrence*, 31 Colo. 301, 73 Pac. 39; Am. Dig. 1903A, col. 1532; 18 Cent. Dig. cols. 603, 604) alike where the rule in *Rylands* v. *Fletcher* is in force (*Illingsworth* v. *Boston*, 161 Mass. 583, 37 N. E. 778, 25 L. R. A. 552) and where it is not (*City* v. *Watervliet*, 76 Hun, 136, 27 N. Y. Supp. 848; *Ennis* v. *Gray*, 87 Hun, 355, 34 N. Y. Supp. 379), and to similar cases of damage caused by water mains, also alike where that rule is recognized (*Blyth* v. *Birmingham*, 25 L. J. Exch. 212) and where it is not (*Terry* v. *Mayor*, 8 Bosw. [N. Y.] 504). Nor have we been able to find any English case sustaining absolute liability. On the contrary, in *Price* v. *South Metropolitan*, 65 L. J. Q. B. Div. 126, an action seeking recovery of damages from an explosion of gas escaped from pipes, Lord Russell, C. J., said: "It is clear, too, that where a gas company, . . . having statutory authority to lay pipes, does so in exercise of its statutory powers, the 'wild beast' theory referred to in the well-known case of *Fletcher* v. *Rylands* [35 L. J. Exch. 154] is inapplicable."

. . . . . .

It is evident that the ultimate justification of the inapplicability of the rule of insurance against harm to cases of damage by gas escaping from mains lies in the controlling regard of the common law, not for doctrine, but for common sense. Its paramount object is to work out substantial, not metaphysical, justice. Its just claim to distinction is to be found, not in the logical consistency of its applied theories, but in the practical wisdom with which it has adapted its rules to varying subject-matter and conditions. Finally, it is to be observed that the severity of the rule of absolute liability in *Rylands* v. *Fletcher* is opposed to the unmistakable tendency of the law in all its allied branches to rest responsibility for damages upon legal culpability.

(4) The conclusion, thus justified by authorities and dictated by reasons valid as a whole, is that the recovery of damages to shade trees on premises of the owner of land, caused by the escape of gas from mains on a public street, is to be determined in accordance with principles of negligence, and not by the doctrine of insurance against harm.

CHAPTER XIII.

LIABILITY OF OWNER, OR KEEPER, OF ANIMALS.

SECTION I.

Trespass by Animals on Land.

WELLS *v.* HOWELL.

1822. 19 *Johnson, New York*, 385.

In error, on *certiorari*, to a Justice's Court. Howell sued Wells before the Justice, and declared against him for that his (Wells') horse had entered the plaintiff's field and destroyed the grass, &c., there, to his damage of ten dollars.

Wells pleaded that there was no fence around the field when the damage was done, and admitted the trespass and the amount of damage. Howell demurred to the plea. It was admitted that there was no fence, as stated, and that there was no town by-law about fences, or cattle running at large. The Justice gave judgment for the plaintiff below, for ten dollars and costs.

Per Curiam. Every unwarrantable entry on another's land is a trespass, whether the land be enclosed or not. 3 Bl. Com. 209; 3 Selwyn's N. P. 1101. A person is equally answerable for the trespass of his cattle as of himself. 3 Bl. Com. 211. The defendant below was bound to show a right to permit his cattle to go at large; and it is conceded that there was no town regulation on the subject. The judgment must be affirmed.

Judgment affirmed.

Beardsley, C. J., in TONAWANDA R. R. *v.* MUNGER.

1848. 5 *Denio, New York*, 267–268.

The Court seem to have held that if the plaintiff's oxen escaped from his enclosure after the exercise of "ordinary care and prudence in taking care of" them, he was not responsible for their trespass on the defendants' land. This view of the law, we think, cannot be sustained. The plaintiff was bound at his peril to keep his cattle at home, or at all events to keep them out of the defendants' close, and no degree of

"care and prudence," if the cattle found their way onto the defendants' land, would excuse the trespass. It would be a new feature in the law of trespass, if the owner of cattle could escape responsibility for their trespasses by showing he had used "ordinary," or even extraordinary "care and prudence" to keep them from doing mischief.

NOYES *v.* COLBY.

1855. 30 *New Hampshire* (10 *Foster*), 143.[1]

TRESPASS, for breaking and entering the plaintiff's close in Franklin. Plea, general issue.

The plaintiff proved that towards night, on June 27, the defendant's cow was upon his premises grazing, between his house and stable. There was no fence between his land and the highway.

The defendant then proposed to prove that, at that time he pastured his cow in a pasture, on the road to Salisbury, and that one Heath also pastured his cow in the same pasture. On the evening in question, when Heath drove home his own cow, he also let the defendant's cow out of the pasture. He did this without the knowledge or assent of the defendant, and without any authority, and had never done so before, and after this transaction was requested by the defendant not to do so again. He drove the cow down the road until she came to the point where it connects with the road through the village of Franklin, about two hundred feet from the plaintiff's land, when she strayed along the road and committed the trespass complained of.

The defendant contended that, under such circumstances he could not be held to be a trespasser merely from the fact that he owned the cow; that he had done no wrongful or improper act; that the act of Heath, being without his knowledge or assent, and without his authority, could not make him liable in trespass; that the action should not have been brought against him, but if any trespass had been committed, should have been brought against Heath.

There being no dispute about the facts, the Court ruled that the action could not be maintained; whereupon a verdict was taken for the defendant, upon which judgment was to be rendered, or it was to be set aside, and judgment rendered for the plaintiff for twenty-five cents damages, as this Court might order.

Fowler and *Mugridge*, for plaintiff.

Pike & Barnard, for defendant.

WOODS, C. J. "A man is answerable for not only his own trespass, but that of his cattle also; for if by his negligent keeping they stray upon the land of another (and much more if he permits or drives

[1] Part of case omitted; also arguments of counsel. — ED.

them on), and they there tread down his neighbor's herbage, and spoil his corn or his trees, this is a trespass for which the owner must answer in damages." 3 Black. Com. 211. Such is the law as stated in the words of the author of the Commentaries, which are themselves very high authority on such subjects, and such has been the uniform practice and understanding of the law in all times, so far as the books show, and it is therefore too late to inquire whether the remedy by an action of trespass is founded upon the strictest logical propriety, where the cause of the damage is the negligence, and not the wilful act of the owner of the mischievous beasts."

It is hardly necessary to remark, but for the course of the defendant's argument, that the proposition quoted from Blackstone relates to the case in which the beasts "stray upon the land of another," and not to the case in which they are driven upon it by a stranger; for then the stranger is the author of the wrong, and the horse that he rides, or drives, is the mere passive instrument in his hands, and the owner of it, unless he have lent it for the purpose of the wrong, is as wholly guiltless as any other person. For in that case, the beast does not by the owner's negligent keeping stray upon the land of his neighbors.

It is substantially upon this ground that *Tewksbury* v. *Bucklin*, 7 N. H. Rep. 518, was decided; in which it was held that a party having the custody of the cattle was answerable for the trespass which they committed by straying upon another's inclosure.

The case finds that the cow "strayed along the road," and committed the act complained of. It would not be just to hold the party to the strict meaning of a single word, if it appeared by the context to have been used inaccurately; but it appears distinctly that the animal, although driven by Heath some distance from the pasture in the direction of the *locus in quo*, was not driven upon it so as to be in his hands a mere instrument for committing a trespass. Heath's trespass was upon the chattel of the defendant, but not upon the soil of the plaintiff. He abandoned the cow, and she being no longer in his custody, "strayed," and involved the owner in the consequences ordinarily incident to permitting beasts to stray into the inclosures of others.

When Heath abandoned the cow, she was about twelve rods from the lands of the plaintiff. From that period she was no longer under the control of Heath, but was again in the legal possession of the defendant, and under his general custody and control; and like other owners having the care and custody of their beasts at the time, he is answerable in trespass for her act in straying upon the close in question, and grazing there.

. . . . . .

For misdirection of the judge who tried the cause, the verdict must be set aside, and a *New trial granted.*

BROWN *v.* GILES.

1823. 1 *Carrington & Payne*, 118.

This was an action against the defendant for breaking the plaintiff's close with dogs, etc., and trampling down his grass in a certain close, called Bryant's Close, in the parish of A., on divers days. The defendant pleaded the general issue.

The usual notice not to trespass was proved; and a witness proved that, after the notice, he saw the defendant walking down the turnpike road, and his dog jumped into the field called Bryant's Close.

Park, J., was decidedly of opinion that the dog jumping into the field without the consent of its master not only was not a wilful trespass, but was no trespass at all on which an action could be maintained; he should therefore nonsuit the plaintiff. [Plaintiff then introduced testimony to prove that the defendant had personally, at another time, gone into Bryant's Close.]

Verdict for the Plaintiff. Damages, one farthing.[1]

TILLETT *v.* WARD.

1882. *Law Reports*, 10 *Queen's Bench Division*, 17.[2]

Appeal by special case from the decision of the judge of the County Court of Lincolnshire, holden at Stamford.

The action was to recover £1 for the damage done to goods in the plaintiff's shop.

It appeared that on the 15th of May, 1882, an ox of the defendant was being driven from the live-stock market in Broad Street, Stamford, along a public street called Ironmonger Street, to the defendant's premises. Ironmonger Street has a paved carriage road with a foot pavement on either side, and the plaintiff was the occupier of an ironmonger's shop in the street. The ox, after having gone for some distance down the paved carriage road of Ironmonger Street, driven by the defendant's men, went for a short distance upon the foot pavement on the near or left-hand side, and was driven therefrom by one of the

[1] The question was much argued, whether the owner of a dog is answerable in trespass for every unauthorized entry of the animal into the land of another, as in the case of an ox. And reasons were offered, which we need not now estimate, for a distinction in this respect between oxen and dogs or cats, on account, first, of the difficulty or impossibility of keeping the latter under restraint; secondly, the slightness of the damage which their wandering ordinarily causes; thirdly, the common usage of mankind to allow them a wider liberty; and, lastly, their not being considered in law so absolutely the chattels of the owner as to be the subject of larceny. — Willes, J., in *Read* v. *Edwards*, 17 C. B. N. S. 260, 261. Compare *Doyle* v. *Vance*, 6 Victorian Law Reports (Cases at Law), 87; stated in the next chapter. — Ed.

[2] Arguments omitted. — Ed.

drovers in charge on to the carriage road, and after continuing for a farther distance upon such carriage road, turned again on the pavement about twelve yards from the plaintiff's shop, and continued upon the pavement until it came opposite the plaintiff's shop, when it passed through the open doorway into the shop and did damage to goods therein to the amount claimed. The ox was, as soon as possible after such entry and damage, driven by the defendant's men from the shop to the carriage road and to defendant's premises in another street; but they did not succeed in getting it out until about three-quarters of an hour from the time when it entered. No special act of negligence was proved on the part of the persons in charge of the ox, and there was no evidence that it was of a vicious or unruly nature, or that the defendant had any notice that there was anything exceptional in its temper or character, or that it would be unsafe to drive it through the public streets in the ordinary and usual way. It was proved that at the time the ox left the carriage-way the second time, one of the two men of the defendant in charge of the animal was walking by its side, having his hand upon it, and that the other man was walking about three yards in the rear of it. The two men in charge proved that they drove it unaccompanied by other cattle from the market, and they both declared that they did all they could under the circumstances to prevent it going on to the foot pavement and entering the open doorway of the plaintiff's shop, and they stated that the movement of the ox from the carriage-way on to the foot pavement was sudden and could not by any reasonable or available means have been prevented. It was alleged by the defendant's witnesses, and not contradicted, that it was a usual thing for several oxen to be driven from the Stamford market in charge of two men, and sometimes one man. It was admitted that it was not customary to drive oxen with halters, and that they would probably not go quietly if led by halters.

The County Court judge gave a verdict for the amount claimed, giving the defendant leave to appeal.

The question for the opinion of the Court was, whether upon the facts the plaintiff was entitled to the verdict.

Moon (*W. Graham* with him), for defendant.

Sills, for plaintiff.

Lord Coleridge, C. J. In this action the County Court judge has found as a fact that there was no negligence on the part of the drivers of the ox, or, at all events, he has not found that there was negligence, and as it lies on the plaintiff to make out his case, the charge of negligence, so far as it has any bearing on the matter, must be taken to have failed.

Now, it is clear as a general rule that the owner of cattle and sheep is bound to keep them from trespassing on his neighbor's land, and if they so trespass an action for damages may be brought against him, irrespective of whether the trespass was or was not the result of his negligence. It is also tolerably clear that where both parties are upon

the highway, where each of them has a right to be, and one of them is injured by the trespass of an animal belonging to the other, he must, in order to maintain his action, show that the trespass was owing to the negligence of the other or of his servant. It is also clear that where a man is injured by a fierce or vicious animal belonging to another, that *prima facie* no action can be brought without proof that the owner of the animal knew of its mischievous tendencies.

In the present case the trespass, if there was any, was committed off the highway upon the plaintiff's close, which immediately adjoined the highway, by an animal belonging to the defendant which was being driven on the highway. No negligence is proved, and it would seem to follow from the law that I have previously stated that the defendant is not responsible. We find it established as an exception upon the general law of trespass, that where cattle trespass upon unfenced land immediately adjoining a highway the owner of the land must bear the loss. This is shown by the judgment of Bramwell, B., in *Goodwyn* v. *Cheveley*, 28 L. J. (Ex.) 298. That learned judge goes into the question whether a reasonable time had or had not elapsed for the removal of cattle who had trespassed under similar circumstances, and this question would not have arisen if a mere momentary trespass had been by itself actionable. There is also the statement of Blackburn, J., in *Fletcher* v. *Rylands*, L. R. 1 Ex. 265, that persons who have property adjacent to a highway may be taken to hold it subject to the risk of injury from inevitable risk. I could not, therefore, if I were disposed, question law laid down by such eminent authorities, but I quite concur in their view, and I see no distinction for this purpose between a field in the country and a street in a market town. The accident to the plaintiff was one of the necessary and inevitable risks which arise from driving cattle in the streets in or out of town. No cause of action is shown, and the judgment of the County Court judge must be reversed.

Stephen, J. I am of the same opinion. As I understand the law, when a man has placed his cattle in a field it is his duty to keep them from trespassing on the land of his neighbors, but while he is driving them upon a highway he is not responsible, without proof of negligence on his part, for any injury they may do upon the highway, for they cannot then be said to be trespassing. The case of *Goodwyn* v. *Cheveley*, *supra*, seems to me to establish a further exception, that the owner of the cattle is not responsible without negligence when the injury is done to property adjoining the highway, — an exception which is absolutely necessary for the conduct of the common affairs of life. We have been invited to limit this exception to the case of high roads adjoining fields in the country, but I am very unwilling to multiply exceptions, and I can see no solid distinction between the case of an animal straying into a field which is unfenced or into an open shop in a town. I think the rule to be gathered from *Goodwyn* v. *Cheveley*, *supra*, a very reasonable one, for otherwise I cannot see how we could

limit the liability of the owner of the cattle for any sort of injury which could be traced to them. *Judgment for defendant.*[1]

[1] Cattle, while being driven on the highway, enter on the unfenced land of A adjoining the highway, and pass thence on to the unfenced land of B, adjoining the land of A, but not adjoining the highway. B has an action against the owner of the cattle. *Wood* v. *Snider*, 187 New York, 28. See also note in 12 L. R. Ann. N. S. 912. — Ed.

COOLEY ON TORTS, 2d ed., 398–400.

The statutes which, under some circumstances, or for some purposes, require lands to be fenced by their owners, are so various in the several States that it is not easy even to classify them. Some of them provide merely that unless the owner shall cause his lands to be fenced with such a fence as is particularly described, he shall maintain no action for the trespasses of beasts upon them. These statutes are generally limited in their force to exterior fences, and are intended as a part of a system under which cattle are or may be allowed to depasture the highway. In some States, from the earliest days, beasts have been allowed to roam at large in the highways and unenclosed lands, either by general law or on a vote of the township or county to that effect; a futile permission, if owners of lands are not required to fence against them. A more common provision is one requiring the owners of adjoining premises to keep up, respectively, one-half the partition fence between them, this being apportioned for the purpose by agreement, by prescription, or by the order of fence-viewers. A neglect of duty under these statutes would not only preclude the party in fault from maintaining suit for injuries suffered by himself in consequence thereof, but it would seem that if the domestic animals of his neighbor should wander upon his lands, invited by his own neglect, and should there fall into pits, or otherwise receive injury, he would be responsible for this injury, as one occurring proximately from his own default. The statutes which require the construction of partition fences do so for the benefit exclusively of the adjoining proprietors. These proprietors may, at their option, by agreement, dispense with them, and even if they do not agree to do so, but fail to maintain them as the law contemplates, still, if the cattle of the third persons come wrongfully upon one man's lands, and from there enter the adjoining enclosure, it is no answer to an action of trespass brought by the owner of the latter that the partition fence provided for by the law was not maintained.

WAGNER *v.* BISSELL.

1856. 3 *Iowa*, 396.[1]

Appeal from the Jones District Court.

This was an action of replevin for certain cattle. Defendant answered, denying the plaintiff's right to the possession, and also

[1] Arguments, and portions of opinion, omitted. — Ed.

alleging as a special ground of defence, that said cattle (which he admits to be the property of plaintiff) did on the 17th day of August, 1856, trespass upon the uninclosed land of defendant, and while so trespassing, and after he had suffered damage to the amount of fifty dollars, he, said defendant, distrained the same, as he had a right to do; and while thus lawfully distrained, and while he thus rightfully had the possession, the said plaintiff replevied the said cattle, without paying, or offering to pay, for the damages sustained. To this answer the plaintiff demurred, which was sustained. Defendant refused to answer over, and judgment being against him, he appeals. aff.

W. J. Henry, for appellant.

Joseph Mann, for appellee.

WRIGHT, C. J. [After deciding a point of pleading.] There is then but one question in the case, and that is, whether the defendant, for the reasons stated in his answer, was entitled to the possession of the property, as against the plaintiff and owner. We are of opinion that he was not, and that the demurrer was therefore properly sustained.

That at common law, every man was bound to keep his cattle within his own close, under the penalty of answering in damage for all injuries arising from their being abroad, is admitted by all. And a part of the same rule is, that the owner of land is not bound to protect his premises from the intrusion of the cattle of a stranger, or third person; and that if such cattle shall intrude or trespass upon his premises, whether inclosed or not, he may, at his election, bring his action to recover the damages sustained, or distrain such trespassing animals, until compensated for such injury. We need not at present stop to ascertain the origin or reason of this rule. It is sufficient to say, that as a principle of the common law, it is well, and we believe universally settled. We are then led to inquire, whether, independent of any statutory provisions, this rule is applicable to our condition and circumstances as a people; and if it is, then whether it has or has not, been changed by legislative action.

Unlike many of the States, we have no statute declaring in express terms the common law to be in force in this State. That it is, however, has been frequently decided by this Court, and does not, perhaps, admit of controversy. But while this is true, it must be understood that it is adopted only so far as it is *applicable* to us as a people, and may be of a general nature. At this time we need only discuss the question whether the principle contended for is applicable; for there can be no fair ground for claiming that it is not of a general nature.

We have assumed that it is only so much of the common law as is *applicable* that can be said to be in force, or recognized as a rule of action in this State. To say that every principle of that law, however inapplicable to our wants or institutions, is to continue in force, until changed by some legislative rule, we believe has never been claimed, neither indeed could it be, with any degree of reason. What is meant however, by the term "applicable," has been thought to admit of some

controversy. As stated by Catron, J., in the dissenting opinion in the case of *Seely* v. *Peters*, 5 Gilm. 130, "Does it mean applicable to the nature of our political institutions, and to the genius of our republican form of government, and to our Constitution, or to our domestic habits, our wants, and our necessities?" He then maintains that the former only is meant, and that to adopt the latter is a clear usurpation of legislative power by the courts. A majority of the Court held in that case, however, as had been previously decided in *Boyer* v. *Sweet*, 3 Scam. 121, "that in adopting the common law, it must be applicable to the habits and condition of our society, and in harmony with the genius, spirit, and objects of our institutions." And we can see no just or fair objection to this view of the subject. Indeed, there would seem to be much propriety in saying that the distinction attempted is more speculative than practical or real. For what is applicable to our wants, habits, and necessities as a community or state, must necessarily to some extent be determined from the nature and genius of our government and institutions. Or, in other words, to determine whether a particular principle harmonizes with the spirit of our institutions, we must look to the habits and condition of the society which has created and lived under these institutions. We have adopted a republican form of government, because we believe it to be better suited to our condition, as it is to that of all people, — and thereunder we believe our wants, rights, and necessities, as individuals and as a community, are more likely to be protected and provided for. And the conclusion would seem to fairly follow, that a principle or rule which tends to provide for, and protect our rights and wants, would harmonize with that form of government or those institutions which have grown up under it.

But, however this may be, we do not believe that in determining as a Court, whether a particular rule of the unwritten law is applicable, we are confined alone to its agreement or disagreement with our peculiar form of government. To make the true distinction between the rules which are, and are not, applicable, may be frequently embarrassing and difficult to courts.

Where the common law has been repealed or changed by the constitutions of either the States or national government, or by their legislative enactments, it is, of course, not binding. So also, it is safe to say, that where it has been varied by custom, not founded in reason, or not consonant to the genius and manners of the people, it ceases to have force. Bouvier's Law Dict., title *Law Common*. And in accordance with this position, are the following authorities: "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation." *Van Ness* v. *Packard*, 2 Peters, 137. And see other remarks of the learned judge, in delivering the opinion in that case, page 143, which have a bearing upon the principal question involved in this.

In *Goring* v. *Emery*, 16 Pick. 107, in speaking of what parts of the common law and the statutes of England are to be taken as in force in Massachusetts, Shaw, C. J., says: "That what are to be deemed in force is often a question of difficulty, depending upon the nature of the subject, the difference between the character of our institutions, and our general course of policy, and those of the parent country, and upon fitness and usage." And in *The Commonwealth* v. *Knowlton*, 2 Mass. 534, it is said that "our ancestors, when they came into this new world, claimed the common law as their birthright, and brought it with them, except such parts as were adjudged inapplicable to their new state and condition."

In Ohio the rule is laid down as follows: "It has been repeatedly decided by the courts of this State that they will adopt the principles of the common law, as the rule of decision, so far only as those principles are adapted to our circumstances, state of society, and form of government." *Lindsley* v. *Coats*, 1 Ham. 243; see also *Penny* v. *Little*, 3 Scam. 301.

Is the rule of the common law, relied upon by the appellant in this case, applicable to our situation, condition, and usage, as a people? Is it in accordance with our habits, wants, and necessities? As applied to this State, is it founded in reason and the fitness of things? The legislature has certainly not so regarded it. On the contrary, we hope to be able to show that what legislation we have clearly recognizes the opposite rule. At present, we are considering the question without reference to any legislative interpretation or action.

These same inquiries were substantially discussed in the case of *Seely* v. *Peters*, above referred to; and as we could not hope to answer them more satisfactorily than is there done, we adopt the language used in that case, the appropriateness of which, as applied to this State, will be fully appreciated when we reflect that in their resources and necessities, Illinois and Iowa are almost twin sisters. Both alike are agricultural States — both alike have large and extensive prairies — and are alike destitute of timber, as compared with the eastern and older States of the Union.

Says Trumbull, J., in delivering that opinion: "However well adapted the rule of the common law may be to a densely populated country like England, it is surely but ill-adapted to a new country like ours. If this common-law rule prevails now, it must have prevailed from the time of the earliest settlement of the State, and can it be supposed that when the early settlers of this country located upon the borders of our extensive prairies, that they brought with them, and adopted as applicable to their condition, a rule of law requiring each one to fence up his cattle? that they designed the millions of fertile acres stretched out before them, to go ungrazed, except as each purchaser from the government was able to inclose his part with a fence? This State is unlike any of the eastern States in their early settlement, because, from the scarcity of timber, it must be many years yet before our extensive prairies can be fenced; and their luxuriant

growth, sufficient for thousands of cattle, must be suffered to rot and decay where it grows, unless settlers upon their borders are permitted to turn their cattle upon them. Perhaps there is no principle of the common law so inapplicable to the condition of our country and the people as the one which is sought to be enforced now, for the first time, since the settlement of the State. It has been the custom of Illinois, so long that the memory of man runneth not to the contrary, for the owners of stock to suffer them to run at large. Settlers have located themselves contiguous to prairies, for the very purpose of getting the benefit of the range. The right of all to pasture their cattle upon uninclosed ground is universally conceded. No man has questioned this right, although hundreds of cases must have occurred where the owners of cattle have escaped the payment of damages on account of the insufficiency of the fences through which their stock have broken; and never till now has the common-law rule that the owner of cattle is bound to fence them up been suffered to prevail, or to be applicable to our condition. The universal understanding of all classes of community, upon which they have acted by inclosing their crops and letting their cattle run at large, is entitled to no little consideration in determining what the law is; and we should feel inclined to hold, independent of any statutes upon the subject, on account of the inapplicability of the common-law rule to the condition and circumstances of our people, that it does not, and never has, prevailed in Illinois."

The learned judge then proceeds to show that it is not necessary to assume that ground in the case before him, for the reason, as he says, that their entire legislation clearly shows that this rule of the common law never prevailed in that State. In like manner, we now propose to refer to some of our own legislation which, we think, will clearly show that it was never supposed to prevail in this State. [Here WRIGHT, C. J., stated, and commented upon, various statutes.]

This brief reference to these several acts must be sufficient, in our opinion, to satisfy any mind that the legislature never understood that the rule of the common law prevailed in this State. We do not maintain that these provisions expressly change the common-law rule. And did we believe that this principle had, at any time, been well established in this State, we should perhaps hold that it had not been changed by these different statutes. Where, however, it is, to say the least, doubtful whether the rule contended for is in accordance with our situation, condition, and wants as a people, where for a series of years there has been no legislation recognizing the existence of such a rule, and where custom and habit have uniformly negatived its existence, we feel entirely justified in giving force to these acts which, if they do not expressly, certainly do impliedly, change the unwritten law.

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Judgment affirmed.[1]

[1] Compare reasons given for the inapplicability of the old common-law rule to Colorado. BECK, J., in *Morris* v. *Fraker*, 5 Colorado, 428, 429. — ED.

HARRISON *v.* ADAMSON.

1888. 76 *Iowa*, 337.

ACTION to recover damages resulting to plaintiff by defendant's herding and pasturing cattle upon plaintiff's uninclosed land. A demurrer to plaintiff's petition was overruled. From this decision defendant appeals.

Soper & Allen, for appellant.

John Jenswold, Jr., for appellee.

BECK, J. I. The first count of plaintiff's petition, alleging his ownership of a tract of land, avers the following facts as a cause of action: "That the land is and has been unimproved prairie land, chiefly valuable for the crop of natural grass and hay that annually grows thereon; that defendant has been the owner of a large herd of cattle, and, during the spring and summer of 1886, grazed and herded the same on plaintiff's land, in charge of a herdsman, and used and destroyed the crop of grass and hay that grew thereon, for the year 1886; . . . that said defendant, though often requested by plaintiff to keep said cattle off from said premises, still persisted in wilfully driving and keeping said cattle upon said premises." To this count of the petition defendant demurred, and the demurrer was overruled. From this ruling defendant appeals.

. . . . . .

II. It will be observed that the count of the petition assailed by defendant's demurrer shows, as a ground of recovery, that defendant caused his cattle, in the charge of a herdsman, to be herded upon plaintiff's land after being notified and requested to desist therefrom. The allegations of the petition are to the effect that defendant, knowingly and wilfully, caused his cattle to be driven and kept upon plaintiff's land. Surely, the owner of uninclosed prairie land is not deprived of his rights in it by any statute of the state in regard to fences, or which authorizes another to use it for pasture against the owner's will. If he may so use it, why may he not use it for cultivation? There is nothing to be found in the statutes of this state, or the decisions of this court, depriving the owner of uninclosed land of the profits of the grass and pasture thereon, and exempting one who, against his consent, appropriates the grass or pasture, from liability therefor to the owner. The laws of the state provide that trespass is not committed when cattle which are running at large enter upon uninclosed land. But it is quite a different thing when cattle not running at large, but in the charge and under the control of a herdsman, the employee and agent of their owner, are driven and kept upon uninclosed land against the will of the land-owner, and with full knowledge of the owner of the cattle. In that case the trespasser takes and appropriates the use of the land for pasture, and is held by the

law liable therefor. In the other case, where the cattle, being at large without the act or knowledge of the owner, go upon the land, the owner is not liable, for the reason that he committed no trespass, and has not knowingly appropriated the use of the land. . . .

Affirmed.[1]

BEINHORN *v.* GRISWOLD.

1902. 27 *Montana*, 79.[2]

PIGOTT, J. Action to recover damages for injuries alleged to have been caused by the negligence of the defendant. The complaint states that the defendant negligently left exposed a vat containing poisonous liquid; that by reason of such negligence certain cattle of plaintiff and of one Holm drank from the vat some of the liquid, and died from the effects of the poison; and that Holm assigned his demand for damages to the plaintiff. The answer puts in issue the allegation of negligence, and avers that the death of the cattle was caused by the carelessness of the plaintiff and Holm. The plaintiff secured a judgment, and the defendant moved for a new trial on several grounds, one being the insufficiency of the evidence to prove negligence on the part of the defendant. From the order denying a new trial the defendant has appealed.

The facts upon which the plaintiff bases his allegations of negligence are substantially these: During the year 1898 the defendant was the lessee in possession of the Non-Such gold mine and mill site. The property was not inclosed by a legal fence. For the proper conduct of his mining operations he employed the cyanide process, using large quantities of poisonous chemicals, consisting principally of cyanide of potassium, which he diluted with water, and kept in suitable receptacles on the surface of the mining property, but not sufficiently covered to prevent easy access to the poisonous solution. In appearance it resembled water. Cattle of the plaintiff and of Holm, while ranging on the public domain, wandered over to and upon the defendant's mine and mill site, and there drank the poisonous liquid contained in the vats or tubs. The defendant knew that the cattle were in the habit of straying upon his uninclosed property, and he had driven them away whenever he saw them there.

The plaintiff insists there is but one question involved, which he states thus: Is a "landowner who negligently leaves exposed upon his uninclosed premises, where he knows stock are wont to stray, danger-

[1] In *Lazarus* v. *Phelps*, 152 U. S. 81, p. 85, BROWN, J., said that "the trespass authorized, or rather condoned, was an accidental trespass caused by straying cattle." Compare VALENTINE, J., in *U. P. R. Co.* v. *Rollins*, 5 Kansas, 167, pp. 174–175. — ED.

[2] Arguments omitted. — ED.

ous places or substances, whereby another's cattle, straying thereon, are injured, liable for such injury ?" He argues that, as the defendant's mining property was not inclosed by a legal fence, the cattle were not trespassing upon his property, but were rightfully thereon, and that therefore he owed to the plaintiff the duty so to use his property and conduct his business as not to injure the plaintiff's cattle; that, in failing to cover the poisonous solution so as to prevent the cattle from drinking of it, he violated this alleged duty, and as such negligence resulted in the death of the cattle, and consequent loss to the plaintiff, the defendant is liable in damages. In support of his contention the plaintiff cites *Monroe* v. *Cannon*, 24 Montana Reports, 316 (61 Pac. 863, 81 Am. St. Rep. 439), where the owner of pasture land was held entitled to recover the value of grass consumed by bands of sheep deliberately and intentionally driven on it by the herder in charge of them; the opinion containing the following language: "If in the case now under consideration the damage sustained by respondent had resulted from trespasses committed by cattle or sheep or other animals named in the statute, lawfully at large, and not under the direction and control of their owner, then appellant's position would be sound." Neither this language, nor anything said in the opinion, lends countenance to the contention of the plaintiff in the case at bar. The decision does not declare or define any duty owing by the landowner to the owner of straying cattle. These observations apply also to Section 3258 of the Political Code, which reads: "If any cattle, horse, mule, ass, hog, sheep, or other domestic animal break into any inclosure, the fence being legal, as hereinbefore provided, the owner of such animal is liable for all damages to the owner or occupant of the inclosure which may be sustained thereby. This section must not be construed so as to require a legal fence in order to maintain an action for injury done by animals running at large contrary to law." Even if it be conceded that the cattle of the plaintiff were not wrongfully upon defendant's property, no liability would be incurred from the fact that they were injured while there, unless it was the defendant's duty to protect from injury all cattle on his property whose trespass was not of such a nature as to render their owners liable for the trespass. Counsel for the plaintiff urge that, if these cattle were not wrongfully on the defendant's property, they must have been rightfully there; asserting that if there was no remedy by action, there could not be a trespass. To this we cannot yield assent.

The owner is entitled to the exclusive possession of his land, whether fenced or not; and it is beyond the power of the legislature to prescribe, or of custom to create, a right in another to occupy the land or enjoy its fruits. Either written law or custom may withhold from the owner who does not fence his land a remedy for loss suffered by reason of casual trespasses by cattle which stray upon it, and may give a remedy for such trespasses to those only who inclose their land. By custom as well as by statute the common law of England

has been so modified in Montana. This is undoubtedly a legitimate exercise of the police power. It falls far short, however, of conferring a legal right to dispossess the nonfencing owner. He may at pleasure lawfully drive the intruding cattle from his land, and keep them away from it. This is his right, for the cattle are trespassing. The owners of domestic animals hold no servitude upon or interest, temporary or permanent, in the open land of another, merely because it is open. If the landowner fails to "fence out" cattle lawfully at large, he may not successfully complain of loss caused by such live stock straying upon his uninclosed land. For under these circumstances the trespass is condoned or excused, — the law refuses to award damages. While the landowner, by omitting to fence, disables himself from invoking the remedy which is given to those who inclose their property with a legal fence, and while the cattle owner is thereby relieved from liability for casual trespasses, it is nevertheless true that the cattle owner has no *right* to pasture his cattle on the land of another, and that cattle thus wandering over such lands are not rightfully there. They are there merely by the forbearance, sufferance, or tolerance of the nonfencing landowner; there they may remain only by his tolerance.

The cattle-owning plaintiff did not owe to the land-owning defendant the duty to fence his cattle in; the latter did not owe to the former the duty to fence them out; neither of them was under obligation to the other in that regard. The defendant is not liable in this action unless he was negligent. There cannot be negligence without breach of duty. Hence, manifestly, the defendant was not guilty of negligence in omitting to prevent the plaintiff's cattle from going upon his unfenced land.

As has just been said, the straying of the plaintiff's cattle upon the defendant's land did not involve the violation of any legal duty upon the part of the defendant. There would therefore seem to be no basis for the plaintiff's charge of negligence on the part of the defendant, unless it consists in the defendant's alleged failure to protect the cattle from injury while on his land. The damage resulted from a permissive, not an active, cause of injury. We are asked to hold that the law imposed upon the defendant, in addition to the duty of refraining from intentional or wanton injury to the cattle, the duty so to use his property and so to conduct his mining operations thereon as to avoid all dangers to which these trespassing beasts might expose themselves. Counsel invoke the provisions of Section 2296 of the Civil Code, which is declaratory of the common law: "Every one is responsible . . . for an injury occasioned to another by his want of ordinary care or skill in the management of his property. . . ." Giving to the principle thus expressed full recognition, and measuring the rights of the parties by the test of negligence thus furnished, we are unable to find in the record evidence of acts or omissions by the defendant constituting negligence in the management of his property. But the plaintiff contends that, irrespective of Section 2296, the de-

fendant has been guilty of negligence in so using his property as to imperil, and in this case actually injure, the property of another. We think the principles which he invokes have no application to the facts disclosed by the record. To a naked trespasser or mere licensee by sufferance (if the expression may correctly be used) the landowner owes the duty to refrain from any wilful or wanton act causing injury to his person or chattels, and, after discovering that the trespasser is in imminent danger or immediate peril, to use reasonable care to avoid an active cause of injury. *Egan* v. *Montana Central Railway Co.*, 24 Montana Reports, 569, 63 Pac. 831. The rule is different in respect of those who go upon property because of the owner's invitation, either express or implied. As to such persons he is bound, at his peril, to use reasonable care and diligence in keeping his property in safe condition. To a mere licensee or naked trespasser the landowner does not owe the active duty of being diligent or using care in providing against the danger of accident. The distinction is well expressed in *Sweeny* v. *Old Colony & Newport Railroad Co.*, 10 Allen, 368, 87 Am. Dec. 644:

[A long quotation from the opinion in that case is omitted.]

The methods pursued by the defendant in the management and use of his property involved no danger to the plaintiff or his cattle, nor exposed either to risk, so long as he and they remained within the limits of the plaintiff's rights. The contention of the plaintiff rests upon the erroneous theory, heretofore considered, that the cattle owners hold a personal servitude upon, or the right of commons or profit in, all unfenced land, by virtue of which they are supposed to be entitled, as of right, to use for grazing and pasture all of the uninclosed lands of other persons. Such burden upon or easement in gross in open lands has not been granted, and does not exist. We have already decided that such use, while it does not constitute an actionable wrong, is not the exercise of a legal right; and as the cattle owner possessed no right to have his live stock upon the defendant's land, and the latter was clothed with the unquestioned right to drive them away because they were not rightfully there, clearly the defendant had no active duty in respect of them while there. He was, of course, bound to refrain from intentional or wanton injury; if he stood by and knowingly permitted them to drink of the poisonous solution, without making an effort to prevent them from doing so, he might, perhaps, be liable; but neither of these conditions is in the case at bar.

We think there is no proof in the record which justifies the application of the doctrine of invitation, enticement, allurement or attraction. *Deane* v. *Clayton*, 7 Taunt. 489, 531, 533; *Jordin* v. *Crump*, 8 Mees. & W. 782; *Ponting* v. *Noakes*, (1894) 2 Q. B. 281; *Stendal* v. *Boyd*, 67 Minn. 279, 69 N. W. 899; *Twist* v. *Railroad Co.*, 39 Minn. 164, 39 N. W. 402, 12 Am. St. Rep. 626. The soundness of the principles upon which the so-called "turntable" and similar cases are supported is not presented for decision.

We have read the opinions which are opposed to the conclusions here announced. They need not be referred to or discussed. We are entirely satisfied that our conclusions are based upon correct fundamental principles.

The order refusing a new trial is reversed, with costs to the appellant, and the cause is remanded.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY: I concur.

MR. JUSTICE MILBURN: Considering only the facts appearing in this case, I concur in the reversal of the order denying a new trial. I do not concur in all that is said in the opinion with reference to absence of duty owing by one person to another who is trespassing upon the premises of the former, or to the owner of live stock which wander upon such premises.

SECTION II.

Damage by Animals other than Trespass on Land.[1]

MAY v. BURDETT.

1846. 9 *Queen's Bench* (*Adolphus & Ellis, O. S.*), 101.[2]

CASE. The declaration stated that defendant, "before and at the time of the damage and injury hereinafter mentioned to the said Sophia, the wife of the said Stephen May, wrongfully, and injuriously kept a certain monkey, he the defendant well knowing that the said monkey was of a mischievous and ferocious nature, and was used and accustomed to attack and bite mankind, and that it was dangerous and improper to allow the monkey to be at large and unconfined; which said monkey, whilst the said defendant kept the same as aforesaid, heretofore and before the commencement of this suit, to wit, on the 2d of September, 1844, did attack, bite, wound, lacerate, and injure the said Sophia, then and still being the wife of said Stephen May, whereby the said Sophia became and was greatly terrified and alarmed, and became and was sick, sore, lame, and disordered, and so remained and continued for a long time, to wit, from the day and year last aforesaid to the time of the commencement of this suit; whereby, and in consequence of the alarm and fright occasioned by the said monkey so attacking, biting, wounding, lacerating, and injuring her as aforesaid, the said Sophia has been greatly injured in her health," &c.

Plea, not guilty. Issue thereon.

On the trial, before Wightman, J., at the sittings in Middlesex, after Hilary term, 1845, a verdict was found for the plaintiff with £50 damages. Cockburn, in the ensuing term, obtained a rule to show cause why judgment should not be arrested.

[1] Until lately there has been very little authority as to the liability of the owner of bees. For recent decisions, see *O'Gorman* v. *O'Gorman*, Ireland L. R., 1903, vol. ii, 573, K. B. Div.; *Parsons* v. *Manser*, 119 Iowa, 80; *Petey Mfg. Co.* v. *Dryden*, 5 Pennewill's Delaware Reports, 166; *Lucas* v. *Pettit*, 12 Ontario Law, 448; 19 Harvard Law Review, 615; Notes in 97 Am. State Rep. 287, and 62 L. R. Ann. 132. Compare *Earl* v. *Van Alstine*, 8 Barbour (N. Y.), 630; *Olmsted* v. *Rich*, 25 New York State Reports, 271; *Arkadelphia* v. *Clark*, 52 Arkansas, 23. — ED.

[2] Arguments omitted.—ED.

In last Hilary term, January 13, 15, and 26, 1846, before LORD DENMAN, C. J., PATTESON, J., COLERIDGE, J., and WIGHTMAN, J.,

Watson and *Couch* showed cause.

Cockburn and *Pickering*, *contra*.

Cur. adv. vult.

LORD DENMAN, C. J., now delivered the judgment of the Court.

This was a motion to arrest the judgment in an action on the case for keeping a monkey which the defendant knew to be accustomed to bite people, and which bit the female plaintiff. The declaration stated that the defendant wrongfully kept a monkey, well knowing that it was of a mischievous and ferocious nature and used and accustomed to attack and bite mankind, and that it was dangerous to allow it to be at large; and that the monkey, whilst the defendant kept the same as aforesaid, did attack, bite, and injure the female plaintiff, whereby, &c.

It was objected on the part of the defendant that the declaration was bad for not alleging negligence or some default of the defendant in not properly or securely keeping the animal; and it was said that, consistently with this declaration, the monkey might have been kept with due and proper caution, and that the injury might have been entirely occasioned by the carelessness and want of caution of the plaintiff herself.

A great many cases and precedents were cited upon the argument; and the conclusion to be drawn from them appears to us to be that the declaration is good upon the face of it; and that whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous propensities.

The precedents, both ancient and modern, with scarcely an exception, merely state the ferocity of the animal and the knowledge of the defendant, without any allegation of negligence or want of care. A great many were referred to upon the argument, commencing with the Register and ending with *Thomas* v. *Morgan*, 2 C. M. & R. 496; s. c. 5 Tyr. 1085; and all in the same form, or nearly so. In the Register, 110, 111, two precedents of writs are given, one for keeping a dog accustomed to bite sheep, and the other for keeping a boar accustomed to attack and wound other animals. The cause of action, as stated in both these precedents, is the propensity of the animals, the knowledge of the defendant, and the injury to the plaintiff; but there is no allegation of negligence or want of care. In the case of *Mason* v. *Keeling*, reported in 1 Ld. Ray. and 12 Mod., and much relied upon on the part of the defendant, want of due care was alleged, but the scienter was omitted; and the question was, not whether the declaration would be good without the allegation of want of care, but whether it was good without

the allegation of knowledge, which it was held that it was not. No case was cited in which it had been decided that a declaration stating the ferocity of the animal and the knowledge of the defendant was bad for not averring negligence also; but various *dicta* in the books were cited to show that this is an action founded on negligence, and therefore not maintainable unless some negligence or want of care is alleged.

In Comyns' Digest, tit. *Action upon the Case for Negligence* (A 5), it is said that "an action upon the case lies for a neglect in taking care of his cattle, dog, &c;" and passages were cited from the older authorities, and also from some cases at *nisi prius*, in which expressions were used showing that, if persons suffered animals to go at large, knowing them to be disposed to do mischief, they were liable in case any mischief actually was done; and it was attempted to be inferred from this that the liability only attached in case they were suffered to go at large or to be otherwise ill secured. But the conclusion to be drawn from an examination of all the authorities appears to us to be this: that a person keeping a mischievous animal with knowledge of its propensities is bound to keep it secure at his peril, and that if it does mischief, negligence is presumed, without express averment. The precedents as well as the authorities fully warrant this conclusion. The negligence is in keeping such an animal after notice. The case of *Smith* v. *Pelah*, 2 Stra. 1264, and a passage in 1 Hale's Pleas of the Crown, 430,[1] put the liability on the true ground. It may be that if the injury was solely occasioned by the wilfulness of the plaintiff after warning, that may be a ground of defence, by plea in confession and avoidance; but it is unnecessary to give any opinion as to this; for we think that the declaration is good upon the face of it, and shows a *prima facie* liability in the defendant.

It was said, indeed, further, on the part of the defendant, that, the monkey being an animal *feræ naturæ*, he would not be answerable for injuries committed by it if it escaped and went at large without any default on the part of the defendant, during the time it had so escaped and was at large, because at that time it would not be in his keeping nor under his control; but we cannot allow any weight to this objection; for, in the first place, there is no statement in the declaration

[1] After stating that "if a man have a beast, as a bull, cow, horse, or dog, used to hurt people, if the owner know not his quality, he is not punishable, &c.," Hale adds (citing authorities) that "these things seem to be agreeable to law.

"1. If the owner have notice of the quality of his beast, and it doth anybody hurt, he is chargeable with an action for it.

"2. Though he have no particular notice that he did any such thing before, yet if it be a beast that is *feræ naturæ*, as a lion, a bear, a wolf, yea an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage, and so I knew it adjudged in *Andrew Baker's Case*, whose child was bit by a monkey that broke its chain and got loose.

"3. And therefore in case of such a wild beast, or in case of a bull or cow, that doth damage, where the owner knows of it, he must at his peril keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages." 1 Hale's P. C. 430, Part I. c. 33.

that the monkey had escaped, and it is expressly averred that the injury occurred whilst the defendant kept it; we are besides of opinion, as already stated, that the defendant, if he would keep it, was bound to keep it secure at all events.

The rule therefore will be discharged. *Rule discharged.*[1]

FILBURN *v.* PEOPLE'S PALACE AND AQUARIUM COMPANY, LIMITED.

1890. *Law Reports*, 25 *Queen's Bench Division*, 258.

APPEAL from a judgment of Day, J.

The action was brought to recover damages for injuries sustained by the plaintiff by his being attacked by an elephant, which was the property of the defendants, and was being exhibited by them. The learned judge left three questions to the jury (1) whether the elephant was an animal dangerous to man (2) whether the defendant knew the elephant to be dangerous, and (3) whether the plaintiff brought the attack on himself. The jury answered all three questions in the negative. The learned judge entered judgment for the plaintiff for a sum agreed upon in case the plaintiff should be entitled to recover.

The defendants appealed.

Lockwood, Q. C., and *Cyril Dodd*, Q. C., in support of the appeal. There are certain animals recognized as being of an untamable nature, and these a person keeps at his peril. In Hale's Pleas of the Crown (vol. i. p. 430), it is said: "Tho' he have no particular notice that he did any such thing before, yet if it be a beast, that is *feræ naturæ*, as a lion, a bear, a wolf, yea an ape or a monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage." There is, however, no hard and fast line which prevents an animal *feræ naturæ* ceasing to belong to that class and becoming domesticated. The distinction is drawn in *Rex* v. *Huggins*, 2 Ld. Raym. 1574, where it is said: "There is a difference between beasts that are *feræ naturæ*, as lions and tygers, which a man must always keep up at his peril; and beasts that are *mansuetæ naturæ*, and break through the tameness of their nature, such as oxen and horses. In the latter case an action lies, if the owner has had notice of the quality of the beast; in the former case an action lies without such notice." All animals are wild by nature, and the reason for the distinction is, that some of them are treated as domesticated, because they have been tamed and are used in the service of man. Though there are wild elephants, just as there are wild oxen and horses, a great number have

[1] See *Jackson* v. *Smithson*, 15 M. & W. 563. Also, *Card* v. *Case*, in C. B., Feb. 9, 1848.

been tamed, and are used in the service of man; and the same ruling should apply to individuals of this class as to domesticated animals generally. The jury have negatived any knowledge on the part of the defendants of any dangerous character in this elephant, and they are, under these circumstances, entitled to the verdict.

Montague Lush, *contra*, was not called on.

Lord Esher, M.R. The only difficulty I feel in the decision of this case is whether it is possible to enunciate any formula under which this and similar cases may be classified. The law of England recognizes two distinct classes of animals; and as to one of those classes, it cannot be doubted that a person who keeps an animal belonging to that class must prevent it from doing injury, and it is immaterial whether he knows it to be dangerous or not. As to another class, the law assumes that animals belonging to it are not of a dangerous nature, and any one who keeps an animal of this kind is not liable for the damage it may do, unless he knew that it was dangerous. What, then, is the best way of dealing generally with these different cases? I suppose there can be no dispute that there are some animals that every one must recognize as not being dangerous on account of their nature. Whether they are *ferœ naturœ* so far as rights of property are concerned is not the question; they certainly are not so in the sense that they are dangerous. There is another set of animals that the law has recognized in England as not being of a dangerous nature, such as sheep, horses, oxen, dogs, and others that I will not attempt to enumerate. I take it this recognition has come about from the fact that years ago, and continuously to the present time, the progeny of these classes has been found by experience to be harmless, and so the law assumes the result of this experience to be correct without further proof. Unless an animal is brought within one of these two descriptions, — that is, unless it is shown to be either harmless by its very nature, or to belong to a class that has become so by what may be called cultivation, — it falls within the class of animals as to which the rule is, that a man who keeps one must take the responsibility of keeping it safe. It cannot possibly be said that an elephant comes within the class of animals known to be harmless by nature, or within that shown by experience to be harmless in this country, and consequently it falls within the class of animals that a man keeps at his peril, and which he must prevent from doing injury under any circumstances, unless the person to whom the injury is done brings it on himself. It was, therefore, immaterial in this case whether the particular animal was a dangerous one, or whether the defendants had any knowledge that it was so. The judgment entered was in these circumstances right, and the appeal must be dismissed.

Lindley, L. J. I am of the same opinion. The last case of this kind discussed was *May* v. *Burdett*, 9 Q. B. 101, but there the monkey which did the mischief was said to be accustomed to attack mankind, to the knowledge of the person who kept it. That does not decide this case. We have had no case cited to us, nor any evidence, to show

that elephants in this country are not as a class dangerous; nor are they commonly known here to belong to the class of domesticated animals. Therefore a person who keeps one is liable, though he does not know that the particular one that he keeps is mischievous. Applying that principle to this case, it appears that the judgment for the plaintiff was right, and this appeal must be dismissed.

BOWEN, L. J. I am of the same opinion. The broad principle that governs this case is that laid down in *Fletcher* v. *Rylands*, Law Rep. 1 Ex. 265; Law Rep. 3 H. L. 330, that a person who brings upon his land anything that would not naturally come upon it, and which is in itself dangerous, must take care that it is kept under proper control. The question of liability for damage done by mischievous animals is a branch of that law which has been applied in the same way from the times of Lord Holt[1] and of Hale until now. People must not be wiser than the experience of mankind. If from the experience of mankind a particular class of animals is dangerous, though individuals may be tamed, a person who keeps one of the class takes the risk of any damage it may do. If, on the other hand, the animal kept belongs to a class which, according to the experience of mankind, is not dangerous, and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep such an animal, unless he knows that the particular animal that he keeps is likely to do mischief. It cannot be doubted that elephants as a class have not been reduced to a state of subjection; they still remain wild and untamed, though individuals are brought to a degree of tameness which amounts to domestication. A person, therefore, who keeps an elephant, does so at his own risk, and an action can be maintained for any injury done by it, although the owner had no knowledge of its mischievous propensities. I agree, therefore, that the appeal must be dismissed.

Appeal dismissed.[2]

MAUNG KYAW DUN *v.* MA KYIN AND NARAZANAN CHETTY.

1900. 2 *Upper Burma Rulings* (1897–1901), *Civil*, 570.

H. THIRKELL WHITE, ESQ., JUDICIAL COMMISSIONER.

The plaintiff-appellant sued to recover damages on account of the death of his elephant "Do," which died from the effect of wounds inflicted by the respondents' elephant, "Kya Gyi."

The issues which arise in a case of this kind have been stated in two cases of this court. In *Maung Gyi* v. *Po To* [3] it was observed that the issue generally would no doubt be the usual issue as to the existence of

[1] See *Mason* v. *Keeling*, 12 Mod. 332.

[2] Compare *Hayes* v. *Miller*, 150 Alabama, 621, as to a wolf domesticated to such an extent that the owner believed it harmless. — ED

[3] Page 565.

negligence on the part of the owner of the animal doing the damage. In *Maung Saw* v. *Maung Kyaw*,[1] points which arise in a case very similar to the present were indicated. There has been some argument in this court on the application of the doctrine of *scienter*. It is said that "any one who keeps a wild animal, as a tiger or bear, which escapes and does damage, is liable without any proof of notice of the animal's ferocity; but where the damage is done by a domestic animal, the plaintiff must show that the defendant knew the animal was accustomed to do mischief."[2] Again, "a person keeping a mischievous animal with knowledge of its propensities is bound to keep it secure at his peril. If it escapes and does mischief, he is liable without proof of negligence, neither is proof required that he knew the animal to be mischievous, if it is of a notoriously fierce or mischievous species."[3] In Smith's Leading Cases, in the notes on *Fletcher* v. *Rylands*,[4] it is said: "The law of England recognizes two distinct classes of animals. The first class consists of such animals as sheep, horses, oxen, and dogs, which the law assumes not to be of a dangerous nature, and a person who keeps an animal of this class is not liable for any damage it may do, when not trespassing, unless he knew that it was in fact dangerous. The other class consists of animals which have not been shown by experience to be harmless by nature; and one who keeps animals of this class must prevent them from doing injury under any circumstances, unless the person to whom it is done brings it on himself." In the English case on which these remarks are based (*Filburn* v. *People's Palace Company*), it was held that an elephant "did not belong to a class which, according to the experience of mankind, is not dangerous to man, and therefore the owner kept such an animal at his own risk, and his liability for damage done by it was not affected by his ignorance of its dangerous character."[5]

I understand the remarks of my learned predecessor in *Maung Gyi* v. *Po To*[6] above cited to go no further than to suggest that a man should be liable for injury caused by his animal, whether tame or wild, if it is proved that the injury was due to the owner's negligence. In that view, it would not be necessary to draw a distinction between wild and domestic animals. The point for decision would be whether the owner was guilty of negligence or whether he used such care as in the circumstances of the case was reasonable and ordinarily sufficient. The amount of care required would vary according to the class of the animal and according to its known disposition. It could not, I think, be laid down in this country that a man is liable for any damage done by his elephant without any proof of negligence or that he knew it to be of a vicious disposition. In view of the manner in, and extent to,

[1] Page 567.
[2] Collett on Torts, 7th edition, p. 100.
[3] Pollock on Torts, 3d edition, p. 442.
[4] 10th edition, vol. i, p. 827.
[5] Mew's Digest of English Case Law, p. 199.
[6] Page 565.

which elephants are employed in this country such a proposition would be manifestly unjust.

In the present case, therefore, I think it was for the plaintiff to prove that the damage done to his elephant was caused, or rendered possible, by the defendant's negligence. In considering the question of negligence, the defendant's knowledge or want of knowledge that her elephant was of a vicious disposition would be an important point. In a suit of this kind, where an animal like an elephant is concerned, I think the burden of proving negligence is in the first place on the plaintiff who avers it. It might be otherwise if injury by a tiger or bear were concerned.

I agree with the Lower Courts in thinking that it is not proved that the defendant knew that the elephant "Kya Gyi" was of a vicious disposition. It was therefore not incumbent on her to take more than ordinary precautions with him. It does not seem to be shown that ordinary precautions were neglected. It is alleged that "Kya Gyi" twice gored the deceased elephant "Do," and the mahout called by the plaintiff declares that he had neither bell nor fetters. On the other hand, as pointed out in the judgment of the Court of First Instance, the plaintiff himself admitted that "Kya Gyi" had a bell and fetters on the second occasion. It is admitted that all the other elephants of the defendant had bells and fetters. There is direct evidence, at least as good as that for the plaintiff, that "Kya Gyi" was properly provided with them. In my opinion it has not been proved that there was any negligence on the part of the defendant, and any *prima facie* case made out by the plaintiff has been rebutted. I therefore hold that the Lower Courts have rightly decided that the defendants are not liable; and I dismiss this appeal with costs.

Mr. C. G. S. Pilloy, for appellant.

Mr. H. N. Hirjee, for respondent.

MASON *v.* KEELING.

11 *William* III. 12 *Modern*, 332. [1]

Action on the case, in which the plaintiff declared that on the twentieth of June, in the eleventh of the king, the defendant *quendam canem molossum valde ferocem* did keep, and let him go loose unmuzzled *per publica compita*, so that *pro defectu curæ* of the defendant the plaintiff was bit and worried by the said dog, as he was peaceably going about his business in such a street. There was another count, in which it was laid that the defendant knew the dog *ad mordend. assuet.* To the first count there was a demurrer, and to the second not guilty.

[1] Arguments omitted. Compare report of same case in 1 Lord Raymond, 606. — Ed.

GOULD, J. No doubt but in the case of sheep there ought to be a *sciens*, because that is an accidental quality, and not in the nature of a dog. And as to property of a dog, the Books distinguish; for a man has a property in a dog that is a mastiff or spaniel, for the one is for the guard of his house, the other for his pleasure; but this here is a mongrel, and laid to be *valde ferocem*, and that must be an innate fierceness, and not accidental; and if a dog be *assuet.* to bite cows, and the master know it, that will not be sufficient knowledge to make him liable for his biting sheep. Besides, this case is distinguishable in respect of the place, for the law takes notice of highway, and is a security for passengers; and it would be dangerous to keep such dogs near the highway, where all sorts of people pass at all hours; and to maintain this issue, they must give a natural fierceness in evidence.

HOLT, C. J. If it had been said that the defendant knew the dog to be *ferox*, I should think it enough. The difference is between things in which the party has a valuable property, for he shall answer for all damages done by them; but of things in which he has no valuable property, if they are such as are naturally mischievous in their kind, he shall answer for hurt done by them without any notice; but if they are of a tame nature, there must be notice of the ill quality; and the law takes notice that a dog is not of a fierce nature, but rather the contrary; and the presumption is against the plaintiff; for can it be imagined a man would keep a fierce dog in his family wittingly? If any beast in which I have a valuable property do damage in another's soil, in treading his grass, trespass will lie for it; but if my dog go into another man's soil, no action will lie. See the case of *Millan* v. *Hawtree*, 1 Jones, 131, Poph. 161, Latch, 13, 119, that *scienter* is the *gît* of the action; and so is 1 Cro., where it was doubted whether the *scienter* should go to the keeping or quality; nor does it appear here but it was an accidental fierceness, or suppose it were an innate one to this dog particularly; and it had been given to the owner but an hour before, shall he take notice of all the qualities of his dog at his peril, or shall he have his action against the giver for bestowing him a naughty dog? In case a dog bites pigs, which almost all dogs will do, a *scienter* is necessary. 1 Cro. 255. And I do not doubt but if it be generally laid that a dog was used to bite *animalia*, and the defendant knew of it, it will be enough to charge him for biting of sheep, &c.; and by *animalia* shall not be intended frogs or mice, but such in which the plaintiff has property.

And judgment was given for the defendant by HOLT, Chief-Justice, and TURTON, Justice; GOULD, J., *mutante opinionem suam.*[a] [1]

(a) *Sed quare:* for in s. c. 1 Ld. Ray. 608, it is said the case was adjourned, and that afterwards the parties agreed, and therefore no judgment was given.

[1] Under the statutes of some jurisdictions the owner of a dog is made liable irrespective of *scienter* or of negligence in keeping. Sometimes the statutory liability is confined to limited classes of damage; sometimes it extends to any damage to person or property. In some states the owner of the dog is obliged to pay double the amount of damage sustained, and in one instance (the Louisiana statute relative to the killing of sheep by dogs) he is made liable for ten times the damage; Louisiana Act No. 111 of 1886, section 6. —ED.

LORD COCKBURN, IN FLEEMING *v.* ORR (SCOTCH COURT OF SESSIONS).

1853. *Quoted in note, 2 Macqueen's Scotch Cases in House of Lords,* 25.

"I never had any doubt that if my dog worries the sheep of another I am liable.

"It has been urged that the owner's knowledge of the vicious propensities of the dog is requisite to make him civilly responsible, and that he is not liable for damage done by the animal unless such knowledge be proved; but I think that the argument to which I have just now adverted is quite absurd. The vicious tendency of the animal never can be known until some mischief is done; so that the result of the argument would be, that every dog is entitled to have at least one worry, and every bull one thrust, without rendering its master responsible. It may be that such is the law of England, and it rather appears that they have in that country an unbounded toleration for a first offence. But, in the law of Scotland, it is no matter if the animal belonging to the defender, and committing an injury, have four legs or only two. Suppose my coachman, a person in whose skill and care I have from long experience unbounded confidence, drives my carriage over a child, will it be any defence to me that he never did it before?

"There is a well-known principle of the law of Scotland which, I think, is sufficient to carry us through this case. It is, that a party negligently using a dangerous instrument shall be liable for the injury occasioned by his negligence. It is to me quite clear that there was negligence here; and that there is negligence in every case in which a dog of this nature [a foxhound] is so left that he can get at sheep. A man is surely liable for the injurious results of the natural tendency of an animal kept by him, if he does not prevent that tendency from producing those results. Now, it is a natural tendency of such dogs to run after sheep. It is only by education and training that they are brought to run after foxes only. In its untrained state no dog of this kind would waste his energies in running after a fox if it got a good sheep, for the plain reason that a sheep is much more easily caught, and is best worth catching. The tendency to worry sheep is, therefore, a natural tendency in such dogs, and for neglecting to guard against it the owner is responsible. On that ground alone I think the defender liable.

"But a far more important ground of liability than these strictly legal considerations is the common usage and understanding of this country. It is a point which I never heard doubted. There have been plenty of such actions in the Sheriff Courts; but there the discussion has always been on the question of fact, whether the mischief was truly done by the dog of the defender. But I do not think it was ever doubted before, that if the fact was established, the defender was liable for the sheep worried by his dog."

BUXENDIN *v.* SHARP.

Pasch. 8 *Will.* III., C. B. 2 *Salkeld,* 662.

THE plaintiff declared that the defendant kept a bull that used to run at men, but did not say, *sciens* or *scienter,* &c. This was held naught after a verdict; for the action lies not unless the master knows of this quality, and we cannot intend it was proved at the trial, for the plaintiff need not prove more than is in his declaration.[1]

BOSTOCK-FERARI AMUSEMENT COMPANY *v.* BROCKSMITH.

1905. 34 *Indiana Appellate Court,* 566.

ACTION by Otto Brocksmith against Bostock-Ferari Amusement Company. From a judgment for plaintiff, defendant appeals.

W. J. O'Brien, Jr., James S. Prichett, William T. Douthitt, Luther Benson and *Lucius C. Embree,* for appellant.

Jesse P. Haughton, Samuel M. Emison, William A. Collop, George W. Shaw, and *John T. Hays,* for appellee.

COMSTOCK, C. J. The complaint alleges that the plaintiff, while driving in his buggy, was injured in consequence of his horse taking fright from the sight of a bear walking along a public street in the city of Vincennes. The action was begun in the Circuit Court of Knox County, and, upon change of venue, tried in the Circuit Court of Sullivan County. The court rendered judgment upon the verdict of the jury in favor of appellee for $750. The complaint was in three paragraphs. The first was dismissed, and the cause was tried upon the amended second and third paragraphs, to which general denial was filed.

The errors relied upon are the action of the court in overruling demurrers to said second and third paragraphs, respectively, of the complaint, and overruling appellant's motion for a new trial. Some of the reasons set out in the motion for a new trial are that the verdict was contrary to the law, and was not sustained by sufficient evidence.

The question of the sufficiency of the second paragraph of the com-

[1] *Bayntine* v. *Sharp,* 1 Lutwych, 90; Nelson's Translation, 33.

"Midd. ss. CASE against the defendant for keeping a mad bull, which wounded the plaintiff.

"He had a verdict, but the judgment was arrested, because it was not alleged that the defendant did know the bull to be mad.

"It doth not appear when this case was adjudged, nor in what Court, neither is there any book cited in it."—ED.

plaint is not entirely free from doubt, but we conclude that each of said paragraphs is sufficient to withstand a demurrer.

It is sought to maintain an action for damages resulting from the fright of a horse at the sight of a bear, which his keeper and owner was leading along a public street, for the purpose of transporting him from a railroad train, by which he had been carried to Vincennes, to the point in Vincennes at which the bear was to be an exhibit as a part of appellant's show. It is not claimed, either by allegation or proof, that the show was in itself unlawful; and there is no pretence that the transporting of the bear from one place to another for the purpose of exhibition was unlawful, or in itself negligence. The case is therefore one of the fright of a horse merely at the appearance of the bear while he was being led along the street, was making no noise or other demonstration, and was in the control of his keeper. It appears without contradiction from the evidence that when the horse took fright the bear was doing nothing except going with his keeper. He was muzzled. He had a ring in his nose to which a chain was attached. Said chain was strong enough to hold and control him. He had around his neck a collar about two inches wide and one-half inch thick, to which also was attached a chain. The keeper had both chains in his hand when the accident occurred. The chain connected with the ring in his nose was small. The one connected with his collar was large. It was for the purpose of chaining him at night when he was alone. The chains were strong enough to control the bear. The animal was characterized by the witnesses who knew him as "gentle," "kind," "docile." His keeper testified that he had never known him to be mean or to growl. He testified also that he never knew of a bear scaring a horse; that shortly before the accident the keeper met two ladies in a buggy, and their horse did not scare. He was described as of pretty good size and brown. One witness said he was a "large, ugly-looking, brown bear."

When a person is injured by an attack by an animal *ferae naturae*, the negligence of the owner is presumed, because the dangerous propensity of such an animal is known, and the law recognizes that safety lies only in keeping it secure. 2 Am. and Eng. Ency. Law (2d ed.), p. 351. In the case before us the injury did not result from any vicious propensity of the bear. He did nothing but walk in the charge of his owner and keeper, Peter Degeleih. He was being moved quietly upon a public thoroughfare for a lawful purpose.

We have given the facts that are not controverted. There is also evidence leading strongly to support the claim made by appellant that appellee was guilty of negligence, proximately contributing to his injury. Appellant also earnestly argues — supporting its argument with references to recognized authorities — that the owner and keeper of the bear was an independent contractor. But the disposition which we think should be made of the appeal makes it unnecessary to consider these questions. The liability of the appel-

lant must rest on the doctrine of negligence. The gist of the action as claimed by appellee is the transportation of the bear, with knowledge that he was likely to frighten horses, without taking precaution to guard against fright.

1. An animal *ferae naturae*, reduced to captivity, is the property of its captor, 2 Blackstone's Comm., *391, *403; 4 Blackstone's Comm., *235, *236.

2. The owner of the bear had the right to transport him from one place to another for a lawful purpose, and it was not negligence *per se* for the owner or keeper to lead him along a public street for such purpose. *Scribner* v. *Kelley*, (1862) 38 Barb. 14; *Macomber* v. *Nichols*, (1876) 34 Mich. 212, 22 Am. Rep. 522; Ingham, Law of Animals, p. 230.

3. The conducting of shows for the exhibition of wild or strange animals is a lawful business. The mere fact that the appearance of a chattel, whether an animal or an inanimate object, is calculated to frighten a horse of ordinary gentleness, does not deprive the owner of such chattel of his lawful right to transport his property along a public highway. *Macomber* v. *Nichols*, *supra*; *Holland* v. *Bartch*, (1889) 120 Ind. 46, 16 Am. St. 307; *Wabash, etc., R. Co.* v. *Farver*, (1887) 111 Ind. 195, 60 Am. Rep. 696; *Gilbert* v. *Flint, etc., R. Co.*, (1883) 51 Mich. 488, 16 N. W. 868, 47 Am. Rep. 592; *Piolette* v. *Simers*, (1894) 106 Pa. St. 95, 51 Am. Rep. 496. One must use his own so as not unnecessarily to injure another, but the measure of care to be employed in respect to animals and other property is the same. It is such care as an ordinarily prudent person would employ under similar circumstances. This is not inconsistent with the proposition that if an animal *ferae naturae* attacks and injures a person, the negligence of the owner or keeper is presumed. The evidence is that the horse was of ordinary gentleness, but this fact would not deprive the appellant of the right to make proper use of the street. If the bear had been carelessly managed, or permitted to make any unnecessary noise or demonstration, it would have been an act of negligence.

It is not uncommon for horses of ordinary gentleness to become frightened at unaccustomed sights on the public highway. The automobile, the bicycle, the traction-engine, the steam roller may each be frightful to some horses, but still they may be lawfully used on the public streets. King David said, "An horse is a vain thing for safety." Modern observation has fully justified the statement. A large dog, a great bull, a baby wagon may each frighten some horses, but their owners are not barred from using them upon the streets on that account. Nor under the decisions would the courts be warranted in holding that the owner of a bear, subjugated, gentle, docile, chained, would not, under the facts shown in the case at the bar, be permitted to conduct the homely brute along the public streets because of his previous condition of freedom.

In *Scribner* v. *Kelley*, *supra*, the court said: "It does not appear that the elephant was at large, but on the contrary that he was in

the care, and apparently under the control, of a man who was riding beside him on a horse; and the occurrence happened before the passage of the act of April 2, 1862, regulating the use of public highways. There is nothing in the evidence to show that the plaintiff's horse was terrified because the object he saw was an elephant, but only that he was frightened because he suddenly saw moving upon a highway, crossing that upon which he was travelling, and fully one hundred feet from him, a large animate object to which he was unaccustomed — *non constat* that any other moving object of equal size and differing in appearance from such as he was accustomed to see might not have inspired him with similar terror. The injury which resulted from his fright is more fairly attributed to a lack of ordinary courage and discipline in himself, than to the fact that the object which he saw was an elephant."

4. It is alleged in the complaint that the bear was an object likely to frighten a horse of ordinary gentleness, which fact the appellant well knew. There is no evidence that the bear was an object likely to frighten horses of ordinary gentleness, nor that the appellant knew that bear was an object likely to frighten horses of ordinary gentleness. The evidence shows, so far as the observation of the keeper and the appellant gave information, that the bear had not frightened horses.

. . . . . .

The facts upon the question of negligence are undisputed, and that question is therefore to be determined by the court as a matter of law.

Judgment is reversed, with instruction to sustain appellant's motion for a new trial.[1]

22 H. L. Rev. 466

CHURCH, C. J., IN MULLER v. McKESSON.

1878. 73 *New York*, 195, pp. 199, 200.

CHURCH, C. J. . . . It may be that, in a certain sense, an action against the owner for an injury by a vicious dog or other animal, is based upon negligence; but such negligence consists not in the manner of keeping or confining the animal, or the care exercised in respect to confining him, but in the fact that he is ferocious and that the owner knows it, and proof that he is of a savage and ferocious nature is equivalent to express notice. *Earl* v. *Van Alstine*, 8 Barb. 630. The negligence consists in keeping such an animal. In *May* v. *Burdett*, 9 Ad. & El. N. s., 101, DENMAN, Ch. J., said: "But the conclusions to be drawn from an examination of all the authorities ap-

[1] See *Bennet* v. *Bostock*, 13 Scottish Sheriff Court Reports, 50; in the same direction with *Scribner* v. *Kelley*, 38 Barbour, 14, cited above in *Bostock-Ferari case*. — ED.

pears to us to be this, that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril, and that if he does mischief, negligence is presumed."

When accustomed to bite persons, a dog is a public nuisance and may be killed by any one when found running at large. *Putnam* v. *Payne*, 13 J. R. 312; *Brown* v. *Carpenter*, 26 Vt. 638. And when known to the owner, corresponding obligations are imposed upon him. Lord HALE says: "He (the owner) must, at his own peril, keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm the owner is liable in damages." In *Kelly* v. *Tilton*, 2 Abb. Ct. App. Cas. 495, WRIGHT, J., said: "If a person will keep a vicious animal, with knowledge of his propensities, he is bound to keep it secure at his peril." In *Wheeler* v. *Brant*, 23 Barb. 324, Judge BALCOM said: "Defendant's dog was a nuisance, and so are all vicious dogs, and their owners must either kill them or confine them as soon as they know their dangerous habits, or answer in damages for their injuries." In *Card* v. *Case*, 57 Eng. C. L. R. 622, COLTMAN, J., said: "That the circumstances of the defendants keeping the animal negligently is not essential; but the *gravamen* is the keeping the ferocious animal, knowing its propensities." The cases are uniform in this doctrine, although expressed in a variety of language by different judges. *Smith* v. *Pelah*, 2 Strange, 1264; *Jones* v. *Perry*, 2 Esp. 482; *Greason* v. *Keteltas*, 17 N. Y. 496; *Woolf* v. *Chalker*, 31 Conn. 121; *Blackman* v. *Simmons*, 3 Car. & P. 138; *Rider* v. *White*, 65 N. Y. 54.

In some of the cases it is said that from the vicious propensity and knowledge of the owner negligence *will be presumed*, and in others that the owner is *prima facie* liable. This language does not mean that the presumption or *prima facie* case may be rebutted by proof of any amount of care on the part of the owner in keeping or restraining the animal, and unless he can be relieved by some act or omission on the part of the person injured, his liability is absolute.

"This presumption of negligence, if it can be said to arise at all, so as to be in any way material in a case where the owner is absolutely bound at his own peril to prevent mischief is a *presumptio juris et de jure*, against which no averment or proof is receivable. It is not a presumption in the ordinary sense of the word, raising a *prima facie* case which may rebutted." *Card* v. *Case*, *supra*, p. 623, note *b*. It follows that the doctrine of non-liability arising from the negligence of a co-servant in not properly fastening the animal, or in not giving notice of his being loose, cannot be invoked for the reason that the negligence of the master being immaterial, that of his servant must be also.

DE GRAY *v.* MURRAY.

1903. 69 *New Jersey Law*, 458.

GUMMERE, C. J. This was an action to recover for injuries resulting to the plaintiff in error (the plaintiff below) from the bite of a dog, owned by the defendant in error, which attacked her while she was walking on the public street. At the close of the testimony the trial judge directed a verdict for the defendant, and the plaintiff seeks to review the judgment entered upon that verdict.

It is the settled law that the owner of a dog will not be held responsible for injuries resulting to another person from its bite unless it be shown that the dog had previously bitten some one else, or was vicious, to the knowledge of the owner. *Smith* v. *Donohue*, 20 Vroom, 548, and cases cited.

[After discussing the evidence, and holding that there was an utter failure to prove *scienter*.]

But even if the evidence submitted would support the conclusion that the dog had a propensity to bite, and that what the defendant heard about its attack on the boy charged him with knowledge of that propensity, the direction of a verdict in his favor was not erroneous. In England, and in some of our sister states, it is held that the owner of an animal which has a propensity to attack and bite mankind, who keeps it with the knowledge that it has such a propensity, does so at his peril, and that his liability for injuries inflicted by it is absolute. A leading case is that of *May* v. *Burdett*, 9 Q. B. (N. S.) 112, in which it is stated that "the conclusion to be drawn from all the authorities appears to be this: that a person keeping a mischievous animal, with knowledge of its propensity, is bound to keep it secure at his peril, and that if it does mischief, negligence is presumed without express averment. The negligence is in keeping such an animal after notice." Subsequently, the Court of Exchequer Chamber, adopting as accurate the principle underlying the decision of *May* v. *Burdett*, and referring to the opinion in that case, among others, as an authority for its conclusion, declared, in the case of *Fletcher* v. *Rylands*, L. R. 1 Exch. 265, that "one who, for his own purposes, brings upon his land, and keeps there, anything likely to do mischief if it escapes, is *prima facie* answerable for all the damage which is the natural consequence of its escape." The application of this principle led the court to fix liability upon the owner of land, who had stored water in a reservoir built thereon, for injury done to adjoining property by water escaping from the reservoir, notwithstanding that such escape was not due to any negligence on the part of the owner. Ten years after the decision of *Fletcher* v. *Rylands*, the rule laid down in that case was applied in this state, at circuit, in the case of *Marshall* v. *Welwood*, 9 Vroom, 339, and the owner of a steam boiler, which blew up and wrecked adjacent property, was held liable for the damage done, not-

withstanding the fact that the bursting of the boiler was not due to any negligence on his part. The case was subsequently reviewed here, on rule to show cause, and this court, in a masterly opinion by the late Chief Justice Beasley, expressly disapproved of the doctrine laid down in *Fletcher* v. *Rylands* (which, as I have already stated, is rested, among other decisions, on *May* v. *Burdett*), and declared that no man is, in law, an insurer that the acts which he does, such acts being lawful and done with care, shall not injuriously affect others; and that an injury which results from a lawful act, done in a lawful manner, and without negligence on the part of the person doing the act, will not support an action. Applying that principle to the case in hand, this court then held that the owner of a steam boiler, which he has in use on his own property, is not responsible, in the absence of negligence, for the damages done by its bursting. The principle laid down in *Marshall* v. *Welwood* was reiterated by this court in the case of *Hill* v. *Ulshowski*, 32 Id. 375.

The right of a man to keep a vicious dog for the protection of his home and property is conceded in the case of *Roehers* v. *Remhoff*, 26 Vroom, 475. He is, of course, bound to exercise a degree of care, commensurate with the danger to others which will follow the dog's escape from his control, to so secure it that it will not injure any one who does not unlawfully provoke or intermeddle with it. *Worthen* v. *Love*, 60 Vt. 285. But if the owner does use such care, and the dog nevertheless escapes and inflicts injury, he is not liable.

In the case now under consideration the undisputed evidence makes it clear that the defendant fully discharged the duty of using due care to prevent the escape of his dog from his premises, and that the plaintiff's injury was not due to any neglect in that regard upon his part. She was bitten in the early morning, between half-past six and seven o'clock. On the preceding evening the defendant shut the dog in his carpenter shop (which adjoined his dwelling) and locked him in. During the night the dog gnawed away the woodwork from around the lock of the door to such an extent that the lock became detached, thus permitting the door to open and the dog to escape. That a reasonably prudent man would not have anticipated any such occurrence must be admitted.

The judgment under review should be affirmed.[1]

MARLOR *v.* BALL.

1900. 16 *Times Law Reports*, 239.

In the Court of Appeal.

This was an application by the defendant for judgment or a new trial in an action tried before Mr. Justice Phillimore and a special

[1] Compare *Baker* v. *Snell*, L. R. (1908), 2 K. B., 352, 825, and the criticism of Mr. Beven in 22 Harvard Law Review, 465. — Ed.

jury at Manchester. The action was brought to recover damages for personal injuries sustained by the plaintiff through being bitten by a zebra belonging to the defendant. The plaintiff was a working man. The defendant was the proprietor of the Chadderton-hall pleasure-grounds, at Oldham, where he kept an exhibition of wild animals. The plaintiff went with his wife and his brother-in-law to see the exhibition, and, having paid for admission, entered the gardens. While they were walking along they found the door of a stable standing open, and went in. There were four zebras inside the stable, each in a separate stall and properly tied up by a halter to the manger. The plaintiff went up to one of the zebras and stroked it. The animal kicked out, and the plaintiff being then standing against the partition, the animal pressed him through the partition, and he fell into the next stall, where another zebra bit his hand, which had to be amputated. At the trial the jury returned a verdict for the plaintiff for £175.

Mr. Montague Lush, for the defendant, in support of the application for judgment or a new trial, contended that there was no evidence on which the defendant could be held liable. The common law obligation of a person who kept animals *ferae naturae* was to keep them secure, or, in other words, to prevent them from getting loose. He was liable to an action, if, in consequence of a failure on his part to comply with that obligation, any other person was injured. In such a case it was not necessary for the plaintiff to allege negligence. But in this case there had been no failure to comply with that common law obligation. Here the animals were kept secure, they were not loose. The plaintiff, therefore, had to allege negligence, and the alleged negligence appeared to be this, that the defendant did not provide a keeper, or some physical barrier to prevent people from meddling with the animals. But this allegation did not show a cause of action at all. There was no authority for saying that an action lay for not preventing the plaintiff from bringing an injury on himself. It was not sufficient for the plaintiff here to show that the door was open. The door being open might be an invitation to go in, but it was not an invitation to meddle by stroking the zebras. The plaintiff failed to show any negligence on the part of the defendant, and he had no remedy. Counsel referred to *Filburn* v. *The People's Palace and Aquarium Company (Limited)*, 25 Q. B. D. 258; and *Memberz* v. *The Great Western Railway Company*, 14 App. Cas. 179.

Mr. S. T. Evans, for the plaintiff, said the foundation of the action was that zebras were dangerous animals, and it was the duty of persons who kept dangerous animals to prevent them from doing injury. The leaving the door of the stable unlocked was a default on the part of the defendant. The plaintiff was not in any way warned that these zebras were wild animals. The evidence taken altogether showed that these zebras were kept in much the same way as horses would ordinarily be kept. He referred to *May* v. *Burdett*, 9 Q. B. 101.

The Court allowed the application and ordered judgment to be entered for the defendant.

Lord Justice A. L. Smith said it was conceded that a zebra was a dangerous animal, and that by law a man who kept a dangerous animal must do so at his peril, and that if any damage resulted, then, apart from any question of negligence, he was liable for the damage. But that was subject to this, that the person who complained of damage must not have brought the injury on himself. Where the plaintiff did something which he had no business to do, — *e. g.* by meddling, as the plaintiff in this case had done, — then the defendant was not liable. That was common law, and it was also common sense. In *Filburn* v. *The People's Palace (Limited)*, Lord Esher expressly dealt with this point. He there said: "It cannot possibly be said that an elephant comes within the class of animals known to be harmless by nature, or within that shown by experience to be harmless in this country, and consequently it falls within the class of animals that a man keeps at his peril, and which he must prevent from doing injury under any circumstances, unless the person to whom the injury is done brings it on himself." The action, therefore, could not be maintained on the common law liability. The plaintiff then set up a claim for negligence, viz., that the door was not kept locked, and that there was no keeper at hand. The evidence showed that the door had been shut, but had got opened. If the plaintiff had been kicked while walking along the stable, an action might have lain, but the plaintiff went into the stall and meddled with the animal. Even if the fact of the door being open was an invitation to go into the stable, it was not an invitation to stroke the animals. In his opinion there was no evidence to go to the jury, and judgment must be entered for the defendant.

Lord Justice Collins said the plaintiff's case was put on the footing of these zebras being wild animals. The duty of a person who owned a wild animal, as laid down in *May* v. *Burdett*, was to keep it secure at his peril. The evidence in this case all went to show that these animals were kept secure within the meaning of that case. In his opinion there was no evidence of any invitation to go and tamper with the animals.

Lord Justice Romer concurred.

Mr. Montague Lush said the defendant would not ask for the costs either of the action or the appeal.[1]

[1] "There are expressions in some of the cases indicating that the liability of the owner is not affected by the negligence of the person injured. . . . If a person with full knowledge of the evil propensities of an animal wantonly excites him, or voluntarily and unnecessarily puts himself in the way of such an animal, he would be adjudged to have brought the injury upon himself, and ought not to be entitled to recover. In such a case it cannot be said, in a legal sense, that the keeping of the animal, which is the *gravamen* of the offence, produced the injury. . . But as the owner is held to a rigorous rule of liability on account of the danger to human life and limb, by harboring and keeping such animals, it

CROWLEY *v.* GROONELL.

1901. 73 *Vermont*, 45.

CASE for an injury to the plaintiff by the defendant's dog. Plea, the general issue. Trial by jury, Rutland County, March Term, 1900, Rowell, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

It appeared that the plaintiff, an old man, was a neighbor of the defendant and went one morning to the defendant's barn, where the latter was, to buy some potatoes of him; that when the plaintiff got near the barn, the defendant's dog, which was large, and was lying near the barn door, assaulted the plaintiff by jumping up and putting his feet upon him and throwing him down, breaking his hip. The testimony was conflicting as to whether this assault was vicious or playful and as to the propensities of the dog known to the plaintiff.

G. E. Lawrence and *G. L. Rice* for the plaintiff.

Butler & Moloney and *Joel C. Baker* for the defendant.

WATSON, J. The only exception upon which the defendant relies is the one to that part of the charge where the court said that a cross and savage disposition on the part of the dog was not necessary in order to impose liability; that a mischievous propensity to commit the kind of assault complained of was enough if the plaintiff's case was otherwise made out; and that in respect to imposing liability, it made no difference whether such assault proceeded from good nature or ill nature, from ugliness or playfulness.

The defendant contends that the duty of restraint attaches only when the owner or keeper has reason to apprehend that the dog may do damage by reason of its viciousness or ferocity, and that the acts of the dog, proceeding from good nature or playfulness, cannot render the defendant liable. If a man have a beast that is *ferae naturae* as a lion, a bear, a wolf, if he get loose and do harm to any person, the owner is liable to an action for damages, though he have no particular notice that he had done any such thing before. The same principle applies to damages done by domestic animals, except that as to them, the owner must have seen or heard enough to convince a man of ordinary prudence of the animal's inclination to commit the class of injuries complained of. With notice to the owner of such propensity in the animal, he is liable for

follows that he ought not to be relieved from it by slight negligence or want of ordinary care [on the part of the plaintiff]. . . . As negligence, in the ordinary sense, is not the ground of liability, so contributory negligence, in its ordinary meaning, is not a defence. These terms are not used in a strictly legal sense in this class of actions, but for convenience . . . I think . . . that the rule of liability before indicated is a reasonable one, and that the owner cannot be relieved from it by any act of the person injured, unless it be one from which it can be affirmed that he caused the injury himself, with a full knowledge of its probable consequences." CHURCH, C. J., in *Muller* v. *McKesson*, 73 New York, 195, pp. 201, 202, 204. — ED.

whatever damages may be suffered by person or property therefrom. It makes no difference whether the animal was of cross and savage disposition and committed the injury by reason of its viciousness and ferocity, or whether such injury resulted from good nature and playfulness — the intent of the animal is not material. The owner or keeper having knowledge of its disposition to commit such injuries must restrain it at his peril, and it is no answer to say that the animal was not cross or savage and was in good nature and playfulness.

. . . . . .

In *State* v. *McDermott*, 6 Atl. Rep. 653 [49 New Jersey, 163], at the close of the plaintiff's evidence, the defendant moved for a nonsuit on the ground that it did not appear that the dog had bitten McDermott maliciously, and also on the ground that there was no evidence that the dog had bitten other persons except in play, or that the defendant had knowledge of the propensity of the dog to bite. The motion was overruled. It was contended that although several persons had been bitten by the dog, of which the defendant had notice, yet it appeared that in every instance the biting occurred while the dog was in a playful mood; that damages could not be recovered where it was shown that the dog had a propensity to bite only in play; and that to justify a recovery, it must appear that the dog was in the habit of biting mankind while in an angry mood, actuated by a ferocious spirit. It was held that this was not the law, — that an action could be maintained against the owner by a party injured upon evidence that a dog, with the knowledge of the owner, had a mischievous propensity to bite mankind, whether in anger or not; for in either case, the person bitten would suffer injury, and that mischievous propensity, within the meaning of the law, was a propensity from which injury is the natural result.

. . . . . .

There was no error in the charge, and judgment is affirmed.

REYNOLDS *v.* HUSSEY.

1886. 64 *New Hampshire*, 64.

Case, for injury to the plaintiff caused by the defendant's horse by striking him with the forward feet while standing harnessed into a stage-wagon, and left unattended at the railway station at Alton Corner. The declaration alleged the vicious character of the animal, and knowledge by the defendant.

To show the horse's vicious disposition and its inclination to injure mankind, evidence of numerous instances of its squealing and kicking at people, in the harness, in the stage-wagon, in the barn, and in the stall, — in fact, that it was a notorious kicker, — was admitted, subject

to exception by the defendant. The defendant did not deny his knowledge of the vicious character of the horse with respect to kicking, but did deny his knowledge of its rearing and striking with the forward feet.

The defendant requested the Court to charge the jury that he was not liable unless he had at some time previous to the accident known or heard that the horse had struck with the forward feet in a manner substantially similar to that in which the jury found that the plaintiff was struck, which the Court gave with this modification, that if on the evidence they find that the horse had a vicious disposition, and was inclined to injure mankind, so that the defendant, as a reasonable man, knew that it would be disposed to commit acts similar to the one sued for, it would be such knowledge on his part as might make him liable for the injury done the plaintiff; to which the defendant excepted.

T. J. Whipple and *Jewell & Stone*, for the plaintiff.

E. A. Hibbard and *E. H. Shannon*, for the defendant.

BLODGETT, J. The owner of domestic animals not being liable, except by statute, for injuries committed by them, unless he is shown to have knowledge of their tendency to commit such injuries, the evidence excepted to as to the propensity of the defendant's horse to injure mankind, and to his knowledge, was so obviously legitimate, that, unaided by brief or argument, we find no ground for its exclusion.

The exception to the charge stands no better. It is not necessary that the vicious acts of a domestic animal brought to the notice of the owner should be precisely similar to that upon which the action against him is founded. If it were, there would be no actionable redress for the first injury of a particular kind committed by such an animal, because its owner would necessarily be exempt from all liability until it should commit another injury of exactly the same kind. It is enough to say that the law sanctions no such absurdity.

Neither is it necessary, in order to fasten a liability upon the owner, that he have notice of a previous injury to others. *Rider* v. *White*, 65 N. Y. 54; *Godeau* v. *Blood*, 52 Vt. 251; *Worth* v. *Gilling*, L. R. 2 C. P. 1; *Judge* v. *Cox*, 1 Stark. 285; Cooley, Torts, 344. It is the propensity to commit the mischief that constitutes the danger (*M' Caskill* v. *Elliott*, 5 Strob. 196), and therefore it is sufficient if the owner has seen or heard enough to convince a man of ordinary prudence of the animal's inclination to commit the class of injuries complained of. *Keightlinger* v. *Egan*, 65 Ill. 235; *Buckley* v. *Leonard*, 4 Denio, 500; *Applebee* v. *Percy*, L. R. 9 C. P. 647; Abb. Trial Ev. 645; Shearm. & Red. Neg. (3d ed.) s. 190. The question in each case is, whether the notice was sufficient to put the owner on his guard, and to require him, as an ordinarily prudent man, to anticipate the injury which has actually occurred. Cooley, Torts, 344. Hence it is unnecessary to prove more than that he has good cause for supposing that the animal may so conduct. *Kittredge* v. *Elliott*, 16 N. H. 82. And a good cause for so supposing in the present case was the defendant's knowledge that

the animal was of vicious disposition and "a notorious kicker;" and the jury might well conclude from these undisputed facts alone that the defendant had sufficient knowledge of its vicious nature and propensity to make him liable for its subsequent attack on the plaintiff in consequence of that nature and propensity. For when it is made to appear that any domestic animal is vicious and inclined to do hurt, and the owner has notice, express or implied, of the fact, the law then imposes upon him the duty to keep the animal secure, and makes him liable to any person who, without contributory negligence on his part, is injured by it. And this rule is so entirely reasonable, and is so strictly in accordance with the legal and moral duty obligatory upon everybody so to keep and use his own property as not to wrong and injure others, that authorities need not be cited in its support.

The instruction requested was not correct. As modified by the Court, it was sufficiently favorable to the defendant.

Exceptions overruled.

DECKER *v.* GAMMON.

1857. 44 *Maine*, 322.[1]

THIS is an action on the case[2] to recover the value of a horse alleged to have been injured by the defendant's horse, and comes forward on exceptions to the rulings of Goodenow, J.

The plaintiff introduced evidence tending to prove that at night, on the 13th of September, 1855, he put his horse into his field well and uninjured. The next morning, September 14, his horse and the defendant's were together in his, the plaintiff's close, the defendant's horse having, during the night, escaped from the defendant's enclosure, or from the highway, into the close of the plaintiff, and that the plaintiff's horse was severely injured by the defendant's horse, by kicking, biting, or striking with his fore feet, or in some other way, so that he died in a few days after.

The defendant requested the presiding judge to instruct the jury that to entitle the plaintiff to recover against the defendant he must prove, in addition to other necessary facts, that the defendant's horse

[1] Arguments omitted. — EL.

[2] In the argument for defendant the declaration is set out as follows: —

"In a plea of the case for that the said plaintiff, on the 14th day of September, 1855, was possessed of a valuable horse, of the value of $125.00, which was peaceably and of right depasturing in his own close, and the defendant was possessed of another horse, vicious and unruly, which was running at large where of right it ought not to be, and being so unlawfully at large, broke into the plaintiff's close, at the time aforesaid, and viciously and wantonly kicked, reared upon, and injured the plaintiff's horse, so that his death was caused thereby, which vicious habits and propensities were well known to the defendant at the time aforesaid. To the damage, &c."

was vicious, and that the defendant had knowledge of such viciousness prior to the time of the alleged injury.

The presiding judge declined giving these instructions, and directed the jury that if they should find that the defendant owned the horse alleged to have done the injury to the plaintiff's horse, and if, at the time of the injury, he had escaped into the plaintiff's close, and was wrongfully there, and while there occasioned the injury, and that the horse died in consequence, that the plaintiff would be entitled to recover the value of the horse so injured. That it was not necessary for the plaintiff to prove that the horse was vicious, or accustomed to acts of violence towards other animals or horses, or that the owner had notice of such viciousness or habits.

The jury returned a verdict for the plaintiff.

C. W. Walton and *S. C. Andrews*, for defendant.

T. Ludden, for plaintiff.

DAVIS, J. There are three classes of cases in which the owners of animals are liable for injuries done by them to the persons or the property of others. And in suits of such injuries the allegations and proofs must be varied in each case, as the facts bring it within one or another of these classes.

1. The owner of wild beasts, or beasts that are in their nature vicious, is, under all circumstances, liable for injuries done by them. It is not necessary, in actions for injuries by such beasts, to allege or prove that the owner knew them to be mischievous, for he is conclusively presumed to have such knowledge; or that he was guilty of negligence in permitting them to be at large, for he is bound to keep them in at his peril.

"Though the owner have no particular notice that he did any such thing before, yet if he be a beast that is *feræ naturæ*, if he get loose and do harm to any person, the owner is liable to an action for the damage." 1 Hale P. C., 430.

"If they are such as are naturally mischievous in their kind, in which the owner has no valuable property, he shall answer for hurt done by them, without any notice; but if they are of a tame nature, there must be notice of the ill quality." Holt, C. J. *Mason* v. *Keeling*, 12 Mod. R. 332.

"The owner of beasts that are *feræ naturæ* must always keep them up, at his peril; and an action lies without notice of the quality of the beasts." *Rex* v. *Huggins*, 2 Lord Raym. 1583.

2. If domestic animals, such as oxen and horses, injure any one, in person or property, if they are rightfully in the place where they do the mischief, the owner of such animals is not liable for such injury unless he knew that they were accustomed to do mischief. And in suits for such injuries, such knowledge must be alleged, and proved. For unless the owner knew that the beast was vicious he is not liable. If the owner had such knowledge he is liable.

"The gist of the action is the keeping of the animal after knowledge of its vicious propensities." *May* v. *Burdett*, 58 Eng. C. L. 101.

"If the owner have knowledge of the quality of his beast, and it doth anybody hurt, he is chargeable in an action for it." 1 Hale P. C. 430.

"An action lies not unless the owner knows of this quality." *Buxendin* v. *Sharp*, 2 Salk. 662.

"If the owner puts a horse or an ox to grass in his field, and the horse or ox breaks the hedge and runs into the highway, and gores or kicks some passenger, an action will not lie against the owner unless he had notice that they had done such a thing before." *Mason* v. *Keeling*, 12 Modern R. 332.

"If damage be done by any domestic animal, kept for use or convenience, the owner is not liable to an action on the ground of negligence, without proof that he knew that the animal was accustomed to do mischief." *Vrooman* v. *Sawyer*, 13 Johns. R. 339.

3. The owner of domestic animals, if they are wrongfully in the place where they do any mischief, is liable for it, though he had no notice that they had been accustomed to do so before. In cases of this kind the ground of the action is that the animals were wrongfully in the place where the injury was done. And it is not necessary to allege or prove any knowledge on the part of the owner that they had previously been vicious.

"If a bull break into an enclosure of a neighbor, and there gore a horse so that he die, his owner is liable in an action of trespass *quare clausum fregit*, in which the value of the horse would be the just measure of damages." *Dolph* v. *Ferris*, 7 Watts & Serg. R. 367.

"If the owner of a horse suffers it to go at large in the streets of a populous city he is answerable in an action on the case for a personal injury done by it to an individual without proof that he knew that the horse was vicious. The owner had no right to turn the horse loose in the streets." *Goodman* v. *Gay*, 3 Harris R. 188. In this case the writ contained the allegation of knowledge on the part of the defendant; but the court held that it was not material and need not be proved.

The case before us is clearly within this class of cases last described. It is alleged in the writ that "the plaintiff had a valuable horse which was peaceably and of right depasturing in his own close, and the defendant was possessed of another horse, vicious and unruly, which was running at large where of right he ought not to be; and being so unlawfully at large, broke into the plaintiff's close, and injured the plaintiff's horse, &c." It is also alleged that "the vicious habits of the horse were well known to the defendant;" but this allegation was not necessary, and may well be treated as surplusage. If the defendant had had a right to turn his horse upon the plaintiff's close it would have been otherwise. But if the horse was wrongfully there the defendant was liable for any injury done by him, though he had no

knowledge that the horse was vicious. The gravamen of the charge was that the horse was wrongfully upon the plaintiff's close; and this was what was put in issue by the plea of not guilty.

Nor are these principles in conflict with the decision in the case of *Van Leuven* v. *Lyke*, 1 Comstock, 515. In that case the action was not sustained because the declaration was not for trespass *quare clausum* with the other injuries alleged by way of aggravation. But in that case there was no allegation that the animal was wrongfully upon the plaintiff's close; or that the injury was committed upon the plaintiff's close. 4 Denio R. 127. And in the Court of Appeals it was expressly held that "if the plaintiff had stated in his declaration that the swine broke and entered his close, and there committed the injury complained of, and sustained his declaration by evidence, he would have been entitled to recover all the damages thus sustained." 1 Coms. 515, 518.

In the case before us, though the declaration is not technically for trespass *quare clausum*, it is distinctly alleged that the defendant's horse, "being so unlawfully at large, broke and entered the plaintiff's close, and injured the plaintiff's horse," which was there peaceably and of right depasturing. This was sufficient; and the instruction given to the jury, "that if the defendant's horse, at the time of the injury, had escaped into the close, and was wrongfully there, and while there occasioned the injury, then the plaintiff would be entitled to recover," was correct. And this being so, the instruction requested "that the plaintiff must prove, in addition to other necessary facts, that the defendant's horse was vicious, and that the defendant had knowledge of such viciousness prior to the time of the injury," was properly refused.

CUTTING, J., did not concur. *Exceptions overruled.*

TROTH *v.* WILLS.

1898. 8 *Pennsylvania Superior Court*, 1.[1]

TRESPASS for personal injuries. Before Brégy, J.

It appears from the evidence that the plaintiff, a lady about fifty-five years of age, was temporarily living with her son, in a small country place, and the cow of the defendant strayed into the garden belonging to the son. The plaintiff, seeing the cow in the garden, came out of her son's house and attempted to drive the cow out of the garden back into the pasture field, from where she entered into the garden. The plaintiff alleges that while so driving the cow out of the garden back into the field, the cow deliberately went towards the field, and that she followed closely behind the cow, when the cow suddenly turned her head and butted the plaintiff in the abdomen, and hence her injuries.

[1] Statement condensed. Arguments and portions of opinions omitted.— ED.

Defendant requested (Request No. 5) a ruling, that, under all the evidence, the verdict should be for the defendant. The court declined so to rule. Verdict and judgment for plaintiff. Defendant appealed.

Charles F. Linde, for appellant.

Julius C. Levi, for appellee.

SMITH, J. It is not necessary, in disposing of this case, to determine the liability of the owner of a domestic animal for all its acts while trespassing upon another's land. In such cases, the primary trespass is the entry of the animal upon the land; the attendant damage for which the owner may be held liable is matter of aggravation. The minimum liability of the owner is for acts arising from the natural propensities of the species, and from special characteristics and acquired habits of the individual of which the owner has notice. When the primary trespass is the wilful act of the owner, he may be held to a larger measure of responsibility; thus if he take a dog into a field where he is himself a trespasser, and the dog there kills or injures sheep, this, though its first offence, may be laid as an aggravation of the trespass: *Beckwith* v. *Shordike*, Burr. 2092; *Michael* v. *Alestree*, 2 Lev. 172, cited in *Dolph* v. *Ferris*, 7 W. & S. 367. Beyond this, the authorities appear unsettled, and principle and analogy form the only guide. Doubtless there may be mischief so far independent of the primary trespass, and unrelated to the propensity or habit leading to this, that it cannot be deemed matter of aggravation. In my view, however, the mischievous act, when incident to the primary trespass, in any of its aspects, or so closely associated with it as to form a substantive part or an immediate result of it, is a legitimate matter of aggravation, for which the owner should be held liable. In such case, the propensity or habit leading to the primary trespass may be regarded as the proximate cause of the resulting injury. If, for example, trespassing cattle, in order to reach the vegetation in a hot bed, break its glass covering, the owner must be held liable for this injury, though cattle are not by nature prone to break glass. Such breaking is incident to the primary trespass, and grows out of the propensity leading to this. If an animal injure a person lawfully trying to prevent it from trespassing, the owner should be held liable, though the injury be one which the animal is not prone to commit. In such case the mischievous act is closely associated with the primary trespass, and in fact grows directly out of it. The same principle must govern if a person be injured in trying to prevent the continuance of a trespass, or of acts forming an aggravation of it.

. . . . . .

In this view of the principles which should govern the determination of this case, the injury to the plaintiff must be deemed an aggravation of the trespass committed by the animal in entering the garden. This injury, indeed, is not such as a cow is ordinarily prone to commit; and there is no evidence that the defendant's cow had contracted

the habit of making such assaults. But the act of the animal was one to which a creature of that kind is naturally disposed on being disturbed while feeding; and it was so directly associated with the primary trespass that, unless the plaintiff's right to prevent a continuance of this be denied, there can be no ground for questioning the liability of the owner. This right cannot be controverted, for under the circumstances the act of the plaintiff is to be regarded as that of the tenant of the premises. The act of the animal by which the plaintiff was injured, so far from being independent of the primary trespass, or unrelated to it, grew directly out of the propensity in which this originated, coupled with the plaintiff's attempt to prevent its continuance. The defendant's fifth point was therefore properly refused. The case was submitted to the jury with suitable instructions, and their finding on the questions involved was concurred in by the trial court.

The judgment is affirmed.

WICKHAM, J. (dissenting.) . . . We are called on to determine whether the rule, so far as our authority goes, shall be established in Pennsylvania, that the owner of a useful, gentle, and domestic animal, belonging to a class recognized from the earliest times as harmless to man, watched, driven to and from the pasture fields, fed and milked by women and children the world over, shall be responsible for the conduct of the animal, foreign to its well-known nature and habits, if it happen that through any negligence of such owner, or his servant, it is permitted to trespass on the land of another, and there injures a third party.

The authorities on this subject are numerous and impossible to reconcile. Some of them rest on statutes or ordinances, not always adverted to in the text-books or digests, in which they are hastily cited. Others are based on the theory, that the right to recover exists because of the trespass to realty, and that any unusual and not to be expected injury caused by the animal to the person of the owner of the land, or his other property, must be alleged and proved by way of aggravation of damages. Another class of cases holds that all injuries committed by an animal, in a place where it has no right to be, must be compensated for by the owner. It is on the latter theory of the law that the plaintiff must recover, if she can sustain her action, as we do not deem it worth while to notice the few erratic and sporadic cases, seemingly decided on no discoverable reason, except an assumed natural equity, that any one injured by anything, animate or inanimate, belonging to another, should be compensated by the owner.

As has already been observed, the plaintiff was not the owner of the land trespassed upon, and it may be remarked that she is aided by no statute.

. . . . . .

It is argued that the appellant's cow was vicious. There is no evidence even suggesting such a tendency, and the learned trial judge so

instructed the jury. Conceding that the animal was breachy, as alleged by the plaintiff, this indicated no ferocity or proneness to attack people. Any one, acquainted with the nature and habits of horses and cows, knows that usually the most intelligent and gentle animals of these species are the most cunning and successful in finding their way into forbidden inclosures and the readiest to run away when discovered. As was said in *Keshan* v. *Gates*, 2 Thomp. & C. (N. Y. Sup. Ct.) 288: "The vicious habits or propensities which the owner of an animal must, when known to him, guard against, are such as are directly dangerous, such as kicking and biting in horses, and hooking in horned animals, and biting in dogs. These habits or propensities may be indulged in at any moment and are inevitably dangerous."

The adoption of the rule, sanctioned by the decisions of many respectable tribunals in other states, that the owner of every trespassing domestic animal is liable merely because it is a trespasser for all injuries it may commit, however contrary to its usual nature and disposition, and regardless of his knowledge of its special viciousness, might often lead to strange and unthought-of consequences. For instance, suppose that a pet lamb, always regarded as a harmless playmate of children, is permitted to wander from its owner's premises into those of a neighbor (this as well as the next illustration is not a supposititious case), and there, in play or anger, butts a child from a high veranda, or a trespassing hatching hen, discovered on its nest by the little son of the owner of the premises, pecks out the eye of the boy as he is lawfully trying to drive it away, the unfortunate owner would be liable in each instance for all the resulting damages. In vain would he urge that the animal causing the injury belonged to a class ordinarily docile in its nature and harmless to man; that he had no reason to anticipate that it would do such unusual mischief; and that he was only responsible for the things hens, lambs, and milch cows usually do and may be expected to do when trespassing, that is, for the natural and probable consequences of their trespasses. The answer, under the rule we are considering, would be: "You were guilty of negligence in permitting your animal to trespass, and therefore you are liable for all its freaks, for the consequences of the wrong, near and remote, probable and improbable, for the things you had reason to anticipate, and those which no one would be likely to think could happen, save as a remote possibility." The results which might follow the application of such a rule demand its rejection, where it has not already been fully adopted.

The only negligence of the defendant revealed by the evidence was his failure to keep his cow out of the garden of the plaintiff's son. To the latter, the defendant would certainly be liable for the harm done to the realty, but as he had no notice or knowledge of any vicious or ferocious propensity on the part of the animal, we do not think that he should be mulcted in damages for the unfortunate injury suf-

fered by the plaintiff, nor, for that matter, even to the owner of the land, had such owner been injured in like manner. The appellant's fifth point, asking the court to direct a verdict in his favor, should have been affirmed.

. . . . . .

PORTER, J., concurred in the dissenting opinion of WICKHAM., J.[1]

DOYLE, APPELLANT, *v.* VANCE, RESPONDENT.

1880. 6 *Victorian Law Reports, Cases at Law*, 87.[2]

STAWELL, C. J. A dog belonging to the defendant got on land belonging to the plaintiff, how, does not appear, and barked at a horse of the plaintiff which was then grazing quietly in an inclosed field; the horse ran away, tried to leap over the fence, fell and broke its neck. The plaint was in the ordinary form, alleging a *scienter* in the defendant. At the trial, an application was made to add a count for trespass by the dog on the plaintiff's land The application was granted, and though the amendment was not formerly written on the plaint, it may now be considered as having been made. A verdict was given for the plaintiff, with £10 damages.

The defendant has appealed, and the question we have to consider is whether, as a matter of law, he is liable for the trespass committed by his dog. It would have been competent for the judge at the trial to have found that the dog was on the land, by the leave and license of the plaintiff; all the circumstances point to the probability of that being the case. But he has found that the dog was there as a trespasser. There are a number of cases in which judges have expressed *obiter dicta*, as to the non-liability of an owner for injuries done by his dog, and curious and singular reasons — that a dog was the companion of man (and the like) — have been assigned for those *dicta;* reasons which courts have treated as entitled to high respect, and which have not been dissented from. There is, however, a comparatively recent case, *Read* v. *Edwards*, *supra*, in which an action was brought against the owner of a dog for having chased and destroyed game, the declaration alleging *scienter* by the defendant. All the *dicta* of the learned judges to which I have referred were cited in the argument, were commented on and received attention. The case was decided on another point, but Mr. Justice Willes, who delivered the judgment of the Court, said: —

[1] In Pollock on Torts, 6th ed., 479, it is said that the owner of cattle and other live stock straying on the land of others is "liable only for natural and probable consequences, not for an unexpected event, such as a horse not previously known to be vicious kicking a human being." In 1 Beven on Negligence, 2d ed., 637, it is said, that if animals are trespassing and do injury not in accordance with the ordinary instinct of the animals, "the owner is not liable for the injury apart from the trespass (though he may be for the trespass), unless he knows of the particular vice which caused the injury."

See FISK, J., in *Peterson* v. *Conlan*, North Dakota, A. D. 1909, 119 Northwestern Reporter, 367, p. 370. — ED.

[2] Statement and arguments omitted. — ED.

"The question was much argued whether the owner of the dog is answerable in trespass for every unauthorized entry of the animal into the land of another, as in the case of an ox, and reasons were offered, which we need not now estimate, for a distinction in this respect between oxen, and dogs or cats, on account, first, of the difficulty or impossibility of keeping the latter under restraint; secondly, the slightness of the damage which their wandering ordinarily causes; thirdly, the common usage of mankind to allow them a wider liberty; and lastly, their not being considered in law so absolutely the chattels of the owner as to be the subject of larceny. It is not, however, necessary in the principal case to answer that question."

The legitimate inference from these observations is that the question, whether the *dicta* I have referred to are law, has not yet been decided, and that the subject is open for consideration. There may be very cogent reasons, socially, for exempting the owner from liability. But there is no reason which a court of law can recognize. Serious injury might be inflicted by a dog revelling in a highly-cultivated *parterre*, and can it with propriety be said that the owner of the garden can obtain no compensation? It has been decided that a dog can be distrained for *damage feasant: Bunch* v. *Kennington*, 1 Q. B. 679. There can be no question, if an ox were substituted for a dog, as having done the mischief complained of in the present case, the owner would be liable. *Cox* v. *Burbidge*, *supra*, which was cited, does not apply. There, the defendant's horse, being on the highway, kicked the plaintiff, a child who was playing there. The defendant was held not guilty of actionable negligence; but that was on the ground that the horse had a right to be on the highway, as well as the child, and was therefore not a trespasser.

In *Lee* v. *Riley*, *supra*, through defect of fences which it was the defendant's duty to repair, the defendant's mare strayed in the night time from his close into an adjoining field, and so into a field of the plaintiff's, in which was a horse. From some unexplained cause the animals quarrelled, and the result was that the plaintiff's horse received a kick from the defendant's mare, which broke its leg, and it was necessarily killed. It was held that the defendant was answerable for the mare's trespass, and the damage was not too remote. The decision was based on the fact that the defendant's mare trespassed on the plaintiff's land, and that it was the duty of the owner of an animal to keep it from trespassing. In *Ellis* v. *The Loftus Iron Co.*, *supra*, the defendant's horse having injured the plaintiff's mare by biting and kicking her through the fence separating the plaintiff's land from the defendants', it was held that there was a trespass by the act of the defendants' horse, for which the defendants were liable, apart from any question of negligence on their part.

The owner of an animal is therefore responsible for any damage fairly resulting from a trespass by that animal. The damage here has resulted from the trespass, and the verdict will therefore stand.

The argument based upon "The Dog Act 1864" (No. 229), sec. 15,

enacting that the owner of a dog shall be liable for injury done to sheep, without proof of *scienter*, should be noticed; it was urged that the necessity for passing such an enactment implied that there was previously no liability. But that argument goes too far. One part of the enactment is declaratory, and the other is new.

BARRY, J. I am of the same opinion. It is remarkable that this question should not have been settled until now, and, apparently from a desire to avoid overruling old cases which had been decided on the most subtle reasons, the judges have abstained from considering the question in a broad aspect. The old reports abound with expressions of peculiar regard for dogs and cats; and Lord Tenterden does not think it beneath his dignity to quote, in his book on shipping, "If mice eat the cargo, and thereby occasion no small injury to the merchant, the master must make good the loss, because he is guilty of a fault; yet if he had cats on board his ship, he shall be excused." One reason given for the exemption of liability, so far as the dog is concerned, is on account of his familiarity with man. But we cannot regard these every day questions in the same subtle way as they were regarded three hundred years ago. The doctrine of trespass is considered on much more reasonable grounds in these days. Where sheep, oxen, or horses, commit a trespass, it has always been held that the owner is liable; and that liability has been extended to poultry, and poultry are as much domesticated as a dog or a cat. In *Brown* v. *Giles*, 1 C. & P. 118, Mr. Justice Park is reported to have said that he was decidedly of opinion that a dog jumping into a field without the consent of its master, not only was not a trespass, but was no trespass at all on which an action could be maintained. But that remark was merely *obiter*; the case was decided for the plaintiff on another point. The learned judge has found that there was a trespass. The dog was left to roam at its discretion, uncontrolled by its master.

STEPHEN, J. I also concur. It seems to have been considered, in old times, that there was a marked distinction between trespass by a dog, and trespass by an ox. Now, as a general rule, no such distinction is made. I cannot see why there should be any. This case illustrates how far the law ought to be altered, so as to preserve its accordance with change of time and place. Of course, the Court cannot alter the clearly-expressed language of an act of Parliament, though the reason for it may have ceased. And so also as to actual decisions of the Courts. If there is reason to alter the law, the legislature must do it. But on this question, there have been no more than *obiter dicta* based upon reasons which have no longer any existence. At one time, a dog could not be the subject of a theft. The Court is at liberty, within reasonable limits, to meet the changed circumstances of the present day. I can see no sound reason why there should be a difference between the case of trespass by a dog, and one by an ox.

Appeal dismissed.[1]

[1] See, in same direction, majority decision in *Chunot* v. *Larson*, 43 Wisconsin, 536. But see *contra*, majority decision in *Van Etten* v. *Noyes*, 112 N. Y. Supp*r*. 888. — ED.

EDDY *v.* UNION RAILROAD COMPANY.

1903. 25 *Rhode Island*, 451.

TRESPASS ON THE CASE for negligence. Heard on the plaintiff's petition for new trial. Petition denied.

JOHNSON, J. The plaintiff was riding in a buggy along Broad Street, in the city of Providence, on the right-hand side of the street, near the curb. At the same time a servant of defendant, in charge of two horses, riding one and leading the other by a halter, was proceeding in the same direction, near the middle of said street. When the plaintiff drove alongside the horses, the led horse suddenly wheeled and kicked the buggy, throwing the plaintiff out and injuring him. At the conclusion of the testimony for the plaintiff, a verdict for the defendant was directed by the presiding justice. The evidence shows that the plaintiff was in the exercise of due care. The question is whether the defendant was negligent.

In *Hammack* v. *White*, 11 C. B. (N. S.) 588, the defendant was riding a horse which he had recently bought and had taken out to try. From some unexplained cause the horse became restive; and, notwithstanding the defendant's well-directed efforts to control him, ran upon the pavement and killed a man. It was held that these facts disclosed no evidence of negligence which the judge was warranted in submitting to a jury. But the court expressly rested that result on the fact that the defendant had used his utmost efforts to prevent the animal from getting on the pavement.

Commenting on that case and the cases of *Cox* v. *Burbridge*, 13 C. B. (N. S.) 430; *Lee* v. *Riley*, 18 C. B. (N. S.) 722; and *Ellis* v. *Loftus Iron Co.*, L. R. 10 C. P. 10, Mr. Bevan uses this language: "Although when a horse is in a place where it has a right to be, any disposition to kick that it may suddenly manifest does not import a liability on its owner; when the horse is where it should not be, and kicks, the kicking is not so far remote from what is to be expected from the natural disposition of horses, that the injury cannot be said to follow in the natural and obvious sequence from the original wrongful act which allowed the horse to get where an opportunity of doing injury is given." 1 Bev. Neg. (2d ed.) 97.

The same principle is stated in 2 Am. & Eng. Ency. of Law (2d ed.), 364, as follows: "If domestic animals are rightfully in the place where they do the injury complained of, the owner will not be liable unless he had knowledge of the vicious propensity of such animals; and in an action for such injuries, knowledge on the part of the owner must be alleged and proved."

In *Healey* v. *Ballentine*, 66 N. J L. 339, where the plaintiff was kicked by a horse which was being led along on the sidewalk, it was held that proof of knowledge, on the part of the owner, of a vicious

propensity of the horse was not necessary, solely on the ground that the horse was not rightfully in the place where it inflicted the injury.

In *Fallon* v. *O'Brien*, 12 R. I. 518, where a horse had escaped from an inclosure and while in the street kicked the plaintiff, this court, after reviewing the cases, p. 520, says: "In the American cases cited, it seems to be recognized that it is the negligence of the owner of the animal straying in the highway which renders him liable for the injury inflicted by it; and that if he is guilty of no negligence he is subject to no liability." See *Goodman* v. *Gay*, 15 Pa. St. 188, and *Dickson* v. *McCoy*, 39 N. Y. 400, there cited.

The decision of the question whether a domestic animal is or is not rightfully in the place where it inflicts the injury complained of is determinative as to the necessity of proof of knowledge, on the part of the owner, of a vicious propensity of the animal.

The leading of horses in the street is an everyday occurrence. It is the common practice of ordinarily careful and prudent men. The horse, being in charge of an attendant and led by a halter, was rightfully in the street. There was no evidence that he had ever before showed any vicious propensity or been known to kick.

Under such circumstances the defendant, in the absence of testimony showing negligence in management of the horse while in the street, would not be liable. The verdict for the defendant was, therefore, rightly directed.

Petition for new trial denied, and case remanded to the Common Pleas Division with direction to enter judgment on the verdict.

Page & Page & Cushing, for plaintiff.

David S. Baker and Lewis A. Waterman, for defendant.

ERLE, C. J., IN COX *v.* BURBIDGE.

1863. 13 *Common Bench, New Series*, 435–437.

I AM of opinion that this rule must be made absolute, on the ground that there was a total absence of evidence to support the cause of action alleged. The facts I take to be these: The plaintiff, a child of tender age, was lawfully upon the highway, and a horse, the property of the defendant, was straying on the highway. As between the owner of the horse and the owner of the soil of the highway or of the herbage growing thereon, we may assume that the horse was trespassing; and, if the horse had done any damage to the soil, the owner of the soil might have had a right of action against his owner. So, it may be assumed, that if the place in question were a public highway, the owner of the horse might have been liable to be proceeded against under the Highway Act. But, in considering the claim of the plaintiff against the defendant for the injury sustained from the kick,

the question whether the horse was a trespasser as against the owner of the soil, or whether his owner was amenable under the Highway Act, has nothing to do with the case of the plaintiff. I am also of opinion that so much of the argument which has been addressed to us on the part of the plaintiff as assumes the action to be founded upon the negligence of the owner of the horse in allowing it to be upon the road unattended, is not tenable. To entitle the plaintiff to maintain the action, it is necessary to show a breach of some legal duty due from the defendant to the plaintiff; and it is enough to say that there is no evidence to support the affirmative of the issue that there was negligence on the part of the defendant for which an action would lie by the plaintiff. The simple fact found is, that the horse was on the highway. He may have been there without any negligence of the owner: he might have been put there by a stranger, or might have escaped from some enclosed place without the owner's knowledge. To entitle the plaintiff to recover, there must be some affirmative proof of negligence in the defendant in respect of a duty owing to the plaintiff. But, even if there was any negligence on the part of the owner of the horse, I do not see how that is at all connected with the damage of which the plaintiff complains. It appears that the horse was on the highway, and that, without anything to account for it, he struck out and injured the plaintiff. I take the well-known distinction to apply here, that the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner knows it. Thus, in the case of a dog, if he bites a man or worries sheep, and his owner knows that he is accustomed to bite men or to worry sheep, the owner is responsible; but the party injured has no remedy unless the *scienter* can be proved. This is very familiar doctrine; and it seems to me that there is much stronger reason for applying that rule in respect of the damage done here. The owner of a horse must be taken to know that the animal will stray if not properly secured, and may find its way into his neighbor's corn or pasture. For a trespass of that kind, the owner is of course responsible. But, if the horse does something which is quite contrary to his ordinary nature, — something which his owner has no reason to expect he will do, he has the same sort of protection that the owner of a dog has; and everybody knows that it is not at all the ordinary habit of a horse to kick a child on a highway. I think the ground upon which the plaintiff's counsel rests his case fails. It reduces itself to the question whether the owner of a horse is liable for a sudden act of a fierce and violent nature which is altogether contrary to the usual habits of the horse, without more.[1]

[1] In support of *Cox* v. *Burbidge*, see *Hadwell* v. *Righton*, L. R. (1907), 2 K. B. 345, and *Higgins* v. *Searle*, 25 Times Law Reports, 301. — Ed.

HARDIMAN v. WHOLLEY.

1899. 172 *Massachusetts*, 411.

Tort, for personal injuries occasioned to the plaintiff by the kick of a horse. At the trial in the Superior Court, before Hammond, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

F. J. Keleher, for the defendant.

H. S. Stearns, for the plaintiff.

Holmes, J. This is an action to recover for personal injuries caused by the kick of a horse. The wagon to which the horse was attached had stuck in the mud half an hour before the accident, and this horse and another had been unhitched and were feeding out of feed-bags attached to their heads. There was evidence that this horse had been made nervous by the effort to pull the wagon out, and by being brutally beaten, and that he was standing partially on the sidewalk. He was standing at right angles to it, and, as the plaintiff approached, suddenly whirled round and kicked him. The case is here upon an exception to the refusal to direct a verdict for the defendant. The refusal was right. It used to be said in England, under the rule requiring notice of the habits of an animal, that every dog was entitled to one worry, but it is not universally true that every horse is entitled to one kick. In England, if the horse is a trespasser and kicks another, the kick will enhance the damages without proof that the animal was vicious and that the owner knew it. *Lee* v. *Riley*, 18 C. B. (N. S.) 722. See *Lyons* v. *Merrick*, 105 Mass. 71, 76. So, in this Commonwealth, going further, it would seem, than the English law, a kick by a horse wrongfully at large upon the highway can be recovered for without proof that it was vicious. *Barnes* v. *Chapin*, 4 Allen, 444; *Marsland* v. *Murray*, 148 Mass. 91; *Dickson* v. *McCoy*, 39 N. Y. 400, 401. See *Cox* v. *Burbidge*, 13 C. B. (N. S.) 430. The same law naturally would be applied to a horse upon a sidewalk where it ought not to be (see *Mercer* v. *Corbin*, 117 Ind. 450, 454), and in this case there was evidence of the further fact that the horse was in an exceptionally nervous condition in consequence of the driver's treatment.

Exceptions overruled.

DICKSON v. McCOY.

1868. 39 *New York*, 400.

This was an action for injury to the plaintiff by the horse of the defendant. The plaintiff, a child of ten years, was passing the stable of the defendant, upon the sidewalk of a populous street in the city of Troy, when the defendant's horse came out of the stable, going loose

and unattended, and, in passing, kicked the plaintiff in the face. The complaint alleged that the horse was "of a malicious and mischievous disposition, and accustomed to attack and injure mankind"; also, that the defendant "wrongfully and negligently suffered the said horse to go at large in and upon the public streets," etc. The proof as to the disposition of the horse was only to the effect that he was young and playful, and, when loose in the street, was accustomed to run and kick in the air, but had never been seen to kick at any person. The defendant moved for a nonsuit, on the ground that there was no proof that the horse was vicious, which was refused. The defendant also requested the court to charge that there was no proof that the horse was possessed of any vicious propensity, or mischievous habit, which required the defendant to exercise special care over him; which the court declined to charge. The court did charge, that "it was for the jury to find, under the evidence, whether the defendant was or was not guilty of negligence in permitting the animal, which did the injury complained of, to run at large, as detailed by the witnesses on the part of the plaintiff," etc.

The jury found a verdict for the plaintiff for $500, which was affirmed, on appeal, at the General Term, and the defendant appeals to this court.

M. I. Townsend, for the appellant.

W. A. Beach, for the respondent.

DWIGHT, J. I agree with the counsel for the defendant that there is no proof in the case to sustain the allegation in the complaint, that this horse was vicious and accustomed to attack and injure mankind. The fact that a horse is young and playful, that he kicks in the air, and runs and gambols when loose in the street, is no proof of a malicious or vicious disposition. But I regard the allegation as unnecessary, and the absence of proof on the point as not affecting the right to recover. The finding of the jury, under the charge of the court, was clearly to the effect that the defendant was guilty of negligence in suffering his horse to go at large upon the sidewalk, as shown in the case. And there was a sufficient allegation to that effect in the complaint. It is not necessary that a horse should be vicious to make the owner responsible for injury done by him through the owner's negligence. The vice of the animal is an essential fact only when, but for it, the conduct of the owner would be free from fault. If the most gentle horse be driven so negligently as to do injury to persons or property, the owner or driver will be responsible. Certainly, not less so if the horse be negligently turned loose in the street without restraint or control. The motion for a nonsuit was properly denied. The only question in the case was that propounded by the court to the jury, "was the defendant guilty of negligence in permitting the horse to go at large in the street?" The court, I think, might very properly have charged as requested by the defendant, that there was no proof to justify the jury in finding that the horse was possessed of any vicious

propensity or mischievous habit. And, yet, it is, in one sense, a mischievous habit for a horse to run and play in the public streets. Though it is no proof of a mischievous disposition, it is liable to produce mischievous results There was, therefore, no error in the refusal to charge as requested. The instructions of the court to the jury were correct, and the verdict is conclusive upon all the questions in the case.

The judgment must be affirmed.

[The opinion of GROVER, J., is omitted.][1]

[1] Compare COULTER, J., *in Goodman* v. *Gay*, 15 Pa. State, 188, pp. 193, 194. — ED.

CHAPTER XIII.

DECEIT.

SECTION I.

General Grounds of Action.

PASLEY *v.* FREEMAN.

29 *George* III. 3 *Term Reports* (*Durnford & East*), 51.

THIS was an action in the nature of a writ of deceit, to which the defendant pleaded the general issue. And after a verdict for the plaintiffs on the third count, a motion was made in arrest of judgment.

The third count was as follows: "And whereas, also, the said Joseph Freeman afterwards, to wit, on the twenty-first day of February, in the year of our Lord 1787, at London aforesaid, in the parish and ward aforesaid, further intending to deceive and defraud the said John Pasley and Edward, did wrongfully and deceitfully encourage and persuade the said John Pasley and Edward to sell and deliver to the said John Christopher Falch divers other goods, wares, and merchandises, to wit, sixteen other bags of cochineal of great value, to wit, of the value of £2,634 16*s.* 1*d.* upon trust and credit; and did for that purpose then and there falsely, deceitfully, and fraudulently assert and affirm to the said John Pasley and Edward that the said John Christopher then and there was a person safely to be trusted and given credit to in that respect, and did thereby falsely, fraudulently, and deceitfully cause and procure the said John Pasley and Edward to sell and deliver the said last-mentioned goods, wares, and merchandises upon trust and credit to the said John Christopher; and, in fact, they the said John Pasley and Edward, confiding in, and giving credit to, the said last-mentioned assertion and affirmation of the said Joseph, and believing the same to be true, and not knowing the contrary thereof, did afterwards, to wit, on the twenty-eighth day of February, in the year of our Lord 1787, at London aforesaid, in the parish and ward aforesaid, sell and deliver the said last-mentioned goods, wares, and merchandises upon trust and credit to the said John Christopher; whereas in truth and fact, at the time of the said Joseph's making his said last-mentioned assertion and affirmation, the said John Christopher was not then and there a person safely to be trusted and given credit to in that respect, and the said Joseph well knew the same, to wit, at

London aforesaid, in the parish and ward aforesaid. And the said John Pasley and Edward further say, that the said John Christopher hath not, nor hath any other person on his behalf, paid to the said John Pasley and Edward, or either of them, the said sum of £2,634 16*s.* 1*d.* last mentioned, or any part thereof, for the said last-mentioned goods, wares, and merchandises; but, on the contrary, the said John Christopher then was and still is wholly unable to pay the said sum of money last mentioned, or any part thereof, to the said John and Edward, to wit, at London aforesaid, in the parish and ward aforesaid; and the said John Pasley and Edward aver that the said Joseph falsely and fraudulently deceived them in this, that at the time of his making his said last-mentioned assertion and affirmation the said John Christopher was not a person safely to be trusted or given credit to in that respect, as aforesaid, and the said Joseph then well knew the same, to wit, at London aforesaid, in the parish and ward aforesaid; by reason of which said last-mentioned false, fraudulent, and deceitful assertion and affirmation of the said Joseph, the said John Pasley and Edward have been deceived and imposed upon, and have wholly lost the said last-mentioned goods, wares, and merchandises, and the value thereof, to wit, at London aforesaid, in the parish and ward aforesaid, to the damage," &c.

Application was first made for a new trial, which after argument was refused, and then this motion in arrest of judgment. *Wood* argued for the plaintiffs, and *Russell* for the defendant, in the last term; but as the Court went so fully into this subject in giving their opinions, it is unnecessary to give the arguments at the bar.

The Court took time to consider of this matter, and now delivered their opinions *seriatim*.

Grose, J. Upon the face of this count in the declaration no privity of contract is stated between the parties. No consideration arises to the defendant; and he is in no situation in which the law considers him in any trust, or in which it demands from him any account of the credit of Falch. He appears not to be interested in any transaction between the plaintiffs and Falch, nor to have colluded with them; but he knowingly asserted a falsehood, by saying that Falch might be safely intrusted with the goods, and given credit to, for the purpose of inducing the plaintiffs to trust him with them, by which the plaintiffs lost the value of the goods. Then this is an action against the defendant for making a false affirmation, or telling a lie, respecting the credit of a third person, with intent to deceive, by which the third person was damnified; and for the damages suffered, the plaintiffs contend that the defendant is answerable in an action upon the case. It is admitted that the action is new in point of precedent; but it is insisted that the law recognizes principles on which it may be supported. The principle upon which it is contended to lie is that, wherever deceit or falsehood is practised to the detriment of another, the law will give redress. This proposition I controvert, and shall endeavor to show that, in every

case where deceit or falsehood is practised to the detriment of another, the law will not give redress; and I say that by the law, as it now stands, no action lies against any person standing in the predicament of this defendant for the false affirmation stated in the declaration. If the action can be supported, it must be upon the ground that there exists in this case what the law deems *damnum cum injuria*. If it does, I admit that the action lies; and I admit that upon the verdict found the plaintiffs appear to have been damnified. But whether there has been *injuria*, a wrong, a tort, for which an action lies, is a matter of law. The tort complained of is the false affirmation made with intent to deceive; and it is said to be an action upon the case analogous to the old writ of deceit. When this was first argued at the bar, on the motion for a new trial, I confess I thought it reasonable that the action should lie; but, on looking into the old books for cases in which the old action of deceit has been maintained upon the false affirmation of the defendant, I have changed my opinion. The cases on this head are brought together in Bro. tit. *Deceit*, pl. 29, and in Fitz. Abr. I have likewise looked into Danvers, Kitchins, and Comyns, and I have not met with any case of an action upon a false affirmation, except against a party to a contract, and where there is a promise, either express or implied, that the fact is true, which is misrepresented; and no other case has been cited at the bar. Then if no such case has ever existed, it furnishes a strong objection against the action, which is brought for the first time for a supposed injury, which has been daily committed for centuries past. For I believe there has been no time when men have not been constantly damnified by the fraudulent misrepresentations of others; and if such an action would have lain, there certainly has been, and will be, a plentiful source of litigation, of which the public are not hitherto aware. A variety of cases may be put. Suppose a man recommends an estate to another, as knowing it to be of greater value than it is; when the purchaser has bought it he discovers the defect, and sells the estate for less than he gave; why may not an action be brought for the loss upon any principle that will support this action? And yet such an action has never been attempted. Or suppose a person present at the sale of a horse asserts that he was his horse, and that he knows him to be sound and surefooted, when in fact the horse is neither the one nor the other; according to the principle contended for by the plaintiffs, an action lies against the person present as well as the seller, and the purchaser has two securities. And even in this very case, if the action lies, the plaintiffs will stand in a peculiarly fortunate predicament, for they will then have the responsibility both of Falch and the defendant. And they will be in a better situation than they would have been if, in the conversation that passed between them and the defendant, instead of asserting that Falch might safely be trusted, the defendant had said, "If he do not pay for the goods, I will;" for then undoubtedly an action would not have lain against the defendant. Other and stronger

cases may be put of actions that must necessarily spring out of any principle upon which this can be supported, and yet which were never thought of till the present action was brought. Upon what principle is this act said to be an injury? The plaintiffs say, on the ground that, when the question was asked, the defendant was bound to tell the truth. There are cases, I admit, where a man is bound not to misrepresent, but to tell the truth; but no such case has been cited, except in the case of contracts; and all the cases of deceit for misinformation may, it seems to me, be turned into actions of assumpsit. And so far from a person being bound in a case like the present to tell the truth, the books supply me with a variety of cases, in which even the contracting party is not liable for a misrepresentation. There are cases of two sorts in which, though a man is deceived, he can maintain no action. The first class of cases (though not analogous to the present) is where the affirmation is that the thing sold has not a defect which is a visible one; there the imposition, the fraudulent intent, is admitted, but it is no tort. The second head of cases is where the affirmation is (what is called in some of the books) a nude assertion, such as the party deceived may exercise his own judgment upon; as where it is matter of opinion, where he may make inquiries into the truth of the assertion, and it becomes his own fault from laches that he is deceived. 1 Roll. Abr. 101; Yelv. 20; 1 Sid. 146; Cro. Jac. 386; *Bayly* v. *Merrel.* In *Harvey* v. *Young*, Yelv. 20, J. S., who had a term for years, affirmed to J. D. that the term was worth £150 to be sold, upon which J. D. gave £150, and afterwards could not get more than £100 for it, and then brought his action; and it was alleged that this matter did not prove any fraud, for it was only a naked assertion that the term was worth so much, and it was the plaintiff's folly to give credit to such assertion. But if the defendant had warranted the term to be of such a value to be sold, and upon that the plaintiff had bought it, it would have been otherwise; for the warranty given by the defendant is a matter to induce confidence and trust in the plaintiff. This case, and the passage in 1 Roll. Abr. 101, are recognized in 1 Sid. 146. How, then, are the cases? None exist in which such an action as the present has been brought; none, in which any principle applicable to the present case has been laid down to prove that it will lie; not even a *dictum.* But from the cases cited some principles may be extracted to show that it cannot be sustained: 1st. That what is fraud, which will support an action, is matter of law. 2d. That in every case of a fraudulent misrepresentation, attended with damage, an action will not lie even between contracting parties. 3d. That if the assertion be a nude assertion, it is that sort of misrepresentation the truth of which does not lie merely in the knowledge of the defendant, but may be inquired into, and the plaintiff is bound so to do; and he cannot recover a damage which he has suffered by his laches. Then let us consider how far the facts of the case come within the last of these principles. The misrepresentation stated in the declaration is respecting the credit of Falch; the defendant asserted that

the plaintiffs might safely give him credit; but credit to which a man is entitled is matter of judgment and opinion, on which different men might form different opinions, and upon which the plaintiffs might form their own, to mislead which no fact to prove the good credit of Falch is falsely asserted. It seems to me, therefore, that any assertion relative to credit, especially where the party making it has no interest, nor is in any collusion with the person respecting whose credit the assertion is made, is like the case in Yelverton respecting the value of the term. But at any rate, it is not an assertion of a fact peculiarly in the knowledge of the defendant. Whether Falch deserved credit depended on the opinion of many; for credit exists on the good opinion of many. Respecting this the plaintiffs might have inquired of others who knew as much as the defendant; it was their fault that they did not, and they have suffered damage by their own laches. It was owing to their own gross negligence that they gave credence to the assertion of the defendant, without taking pains to satisfy themselves that that assertion was founded in fact, as in the case of *Bayly* v. *Merrel.* I am, therefore, of opinion that this action is as novel in principle as it is in precedent, that it is against the principles to be collected from analogous cases, and consequently that it cannot be maintained.

BULLER, J. (The foundation of this action is fraud and deceit in the defendant, and damage to the plaintiffs. And a question is, whether an action thus founded can be sustained in a court of law. Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies.) Per Croke, J., 3 Bulst. 95. But it is contended that this was a bare, naked lie; that, as no collusion with Falch is charged, it does not amount to a fraud; and, if there were any fraud, the nature of it is not stated. And it was supposed by the counsel, who originally made the motion, that no action could be maintained unless the defendant, who made this false assertion, had an interest in so doing. I agree that an action cannot be supported for telling a bare, naked lie; but that I define to be, saying a thing which is false, knowing or not knowing it to be so, and without any design to injure, cheat, or deceive another person. Every deceit comprehends a lie; but a deceit is more than a lie, on account of the view with which it is practised, its being coupled with some dealing, and the injury which it is calculated to occasion, and does occasion, to another person. Deceit is a very extensive head in the law; and it will be proper to take a short view of some of the cases which have existed on the subject, to see how far the Courts have gone, and what are the principles upon which they have decided. I lay out of the question the case in 2 Cro. 196, and all other cases which relate to freehold interests in lands; for they go on the special reason that the seller cannot have them without title, and the buyer is at his peril to see it. But the cases cited on the part of the defendant deserving notice are Yelv. 20, Carth. 90, Salk. 210. The first of these has been fully stated by my brother Grose; but it is to be observed that the book does not affect to give

the reasons on which the Court delivered their judgment; but it is a case quoted by counsel at the bar, who mentions what was alleged by counsel in the other case. If the Court went on a distinction between the words "warranty" and "affirmation," the case is not law; for it was rightly held by Holt, C. J., in the subsequent cases, and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appear on evidence to have been so intended. But the true ground of that determination was that the assertion was of mere matter of judgment and opinion; of a matter of which the defendant had no particular knowledge, but of which many men will be of many minds, and which is often governed by whim and caprice. Judgment, or opinion, in such case implies no knowledge. And here this case differs materially from that in Yelverton; my brother Grose considers this assertion as mere matter of opinion only, but I differ from him in that respect. For it is stated on this record that the defendant knew that the fact was false. The case in Yelverton admits that, if there had been fraud, it would have been otherwise. The case of *Crosse* v. *Gardner*, Carth. 90, was upon an affirmation that oxen which the defendant had in his possession and sold to the plaintiff were his, when in truth they belonged to another person. The objection against the action was that the declaration neither stated that the defendant deceitfully sold them, or that he knew them to be the property of another person; and a man may be mistaken in his property and right to a thing without any fraud or ill intent. *Ex concessis* therefore if there were fraud or deceit, the action would lie; and knowledge of the falsehood of the thing asserted is fraud and deceit. But, notwithstanding these objections, the Court held that the action lay, because the plaintiff had no means of knowing to whom the property belonged but only by the possession. And in Cro. Jac. 474, it was held that affirming them to be his, knowing them to be a stranger's, is the offence and cause of action. The case of *Medina* v. *Stoughton*, Salk. 210, in the point of decision, is the same as *Crosse* v. *Gardner*; but there is an *obiter dictum* of Holt, C. J., that where the seller of a personal thing is out of possession, it is otherwise; for there may be room to question the seller's title, and *caveat emptor* in such case to have an express warranty or a good title. This distinction by Holt is not mentioned by Lord Raym. 593, who reports the same case; and if an affirmation at the time of sale be a warranty, I cannot feel a distinction between the vendor's being in or out of possession. The thing is bought of him, and in consequence of his assertion; and if there be any difference, it seems to me that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on. These cases, then, are so far from being authorities against the present action, that they show that if there be fraud or deceit, the action will lie; and that knowledge of the falsehood of the thing asserted is fraud and deceit. Collusion, then, is not necessary to constitute fraud. In the case of a conspiracy, there must be a collusion

between two or more to support an indictment; but if one man alone be guilty of an offence which, if practised by two, would be the subject of an indictment for a conspiracy, he is civilly liable in an action for reparation of damages at the suit of the person injured. That knowledge of the falsehood of the thing asserted constitutes fraud, though there be no collusion, is further proved by the case of *Risney* v. *Selby*, Salk. 211, where, upon a treaty for the purchase of a house, the defendant fraudulently affirmed that the rent was £30 per annum, when it was only £20 per annum, and the plaintiff had his judgment; for the value of the rent is a matter which lies in the private knowledge of the landlord and tenant; and if they affirm the rent to be more than it is, the purchaser is cheated, and ought to have a remedy for it. No collusion was there stated; nor does it appear that the tenant was ever asked a question about the rent, and yet the purchaser might have applied to him for information; but the judgment proceeded wholly upon the ground that the defendant knew that what he asserted was false. And, by the words of the book, it seems that if the tenant had said the same thing he also would have been liable to an action. If so, that would be an answer to the objection that the defendant in this case had no interest in the assertion which he made. But I shall not leave this point on the *dictum* or inference which may be collected from that case. If A., by fraud and deceit, cheat B. out of £1,000, it makes no difference to B. whether A. or any other person pockets that £1,000. He has lost his money; and if he can fix fraud upon A., reason seems to say that he has a right to seek satisfaction against him. Authorities are not wanting on this point. 1 Roll. Abr. 91, pl. 7. If the vendor affirm that the goods are the goods of a stranger, his friend, and that he had authority from him to sell them, and upon that B. buys them, when in truth they are the goods of another, yet, if he sell them fraudulently and falsely on this pretence of authority, though he do not warrant them, and though it be not averred that he sold them knowing them to be the goods of the stranger, yet B. shall have an action for this deceit. It is not clear from this case whether the fraud consisted in having no authority from his friend, or in knowing that the goods belonged to another person; what is said at the end of the case only proves that "falsely" and "fraudulently" are equivalent to "knowingly." If the first were the fact in the case, namely, that he had no authority, the case does not apply to this point; but if he had an authority from his friend, whatever the goods were sold for his friend was entitled to, and he had no interest in them. But, however that might be, the next case admits of no doubt. For in 1 Roll. Abr. 100, pl. 1, it was held that if a man acknowledge a fine in my name, or acknowledge a judgment in an action in my name of my land, this shall bind me forever; and therefore I may have a writ of deceit against him who acknowledged it. So if a man acknowledge a recognizance, statute-merchant or staple, there is no foundation for supposing that in that case the person acknowledging the fine or judgment was the same person to

whom it was so acknowledged. If that had been necessary it would have been so stated; but if it were not so, he who acknowledged the fine had no interest in it. Again, in 1 Roll. Abr. 95, l. 25, it is said, "If my servant lease my land to another for years, reserving a rent for me, and, to persuade the lessee to accept it, he promise that he shall enjoy the land without incumbrances, if the land be incumbered, &c., the lessee may have an action on the case against my servant, because he made an express warranty." Here, then is a case in which the party had no interest whatever. The same case is reported in Cro. Jac. 425; but no notice is taken of this point, probably because the reporter thought it immaterial whether the warranty be by the master or servant. And if the warranty be made at the time of the sale, or before the sale, and the sale is upon the faith of the warranty, I can see no distinction betweeen the cases. The gist of the action is fraud and deceit; and if that fraud and deceit can be fixed by evidence on one who had no interest in his iniquity, it proves his malice to be the greater. But it was objected to this declaration that if there were any fraud, the nature of it is not stated. To this the declaration itself is so direct an answer that the case admits of no other. The fraud is that the defendant procured the plaintiffs to sell goods on credit to one whom they would not otherwise have trusted, by asserting that which he knew to be false. Here, then, is the fraud and the means by which it was committed; and it was done with a view to enrich Falch by impoverishing the plaintiffs, or, in other words, by cheating the plaintiffs out of their goods. The cases which I have stated, and Sid. 146, and 1 Keb. 522, prove that the declaration states more than is necessary; for *fraudulenter* without *sciens*, or *sciens* without *fraudulenter*, would be sufficient to support the action. But, as Mr. J. Twisden said in that case, the fraud must be proved. The assertion alone will not maintain the action; but the plaintiff must go on to prove that it was false, and that the defendant knew it to be so; by what means that proof is to be made out in evidence need not be stated in the declaration. Some general arguments were urged at the bar to show that mischiefs and inconveniences would arise if this action were sustained; for if a man who is asked a question respecting another's responsibility hesitate or is silent, he blasts the character of the tradesman; and if he say that he is insolvent, he may not be able to prove it. But let us see what is contended for: it is nothing less than that a man may assert that which he knows to be false, and thereby do an everlasting injury to his neighbor, and yet not be answerable for it. This is as repugnant to law as it is to morality. Then it is said that the plaintiffs had no right to ask the question of the defendant. But I do not agree in that; for the plaintiffs had an interest in knowing what the credit of Falch was. It was not the inquiry of idle curiosity, but it was to govern a very extensive concern. The defendant undoubtedly had his option to give an answer to the question or not; but if he gave none, or said he did not know, it is impossible for any court of justice to adopt the possible

inferences of a suspicious mind as a ground for grave judgment. All that is required of a person in the defendant's situation is that he shall give no answer, or that, if he do, he shall answer according to the truth as far as he knows. The reasoning in the case of *Coggs* v. *Barnard*, which was cited by the plaintiff's counsel, is, I think, very applicable to this part of the case. If the answer import insolvency, it is not necessary that the defendant should be able to prove that insolvency to a jury; for the law protects a man in giving that answer, if he does it in confidence and without malice. No action can be maintained against him for giving such an answer, unless express malice can be proved. From the circumstance of the law giving that protection, it seems to follow, as a necessary consequence, that the law not only gives sanction to the question, but requires that, if it be answered at all, it shall be answered honestly. There is a case in the books which, though not much to be relied on, yet serves to show that this kind of conduct has never been thought innocent in Westminster Hall. In *R.* v. *Gunston*, 1 Str. 589, the defendant was indicted for pretending that a person of no reputation was Sir J. Thornycraft, whereby the prosecutor was induced to trust him; and the Court refused to grant a *certiorari*, unless a special ground were laid for it. If the assertion in that case had been wholly innocent the Court would not have hesitated a moment. How, indeed, an indictment could be maintained for that I do not well understand; nor have I learnt what became of it. The objection to the indictment is that it was merely a private injury: but that is no answer to an action. And if a man will wickedly assert that which he knows to be false, and thereby draws his neighbor into a heavy loss, even though it be under the specious pretence of serving his friend, I say *ausis talibus istis non jura subserviunt.*

Ashhurst, J. The objection in this case, which is to the third count in the declaration, is that it contains only a bare assertion, and does not state that the defendant had any interest, or that he colluded with the other party who had. But I am of opinion that the action lies notwithstanding this objection. It seems to me that the rule laid down by Croke, J., in *Bayly* v. *Merrel*, 3 Bulstr. 95, is a sound and solid principle, namely, that fraud without damage, or damage without fraud, will not found an action; but where both concur an action will lie. The principle is not denied by the other judges, but only the application of it, because the party injured there, who was the carrier, had the means of attaining certain knowledge in his own power, namely, by weighing the goods; and therefore it was a foolish credulity, against which the law will not relieve. But that is not the case here, for it is expressly charged that the defendant knew the falsity of the allegation, and which the jury have found to be true; but *non constat* that the plaintiffs knew it, or had any means of knowing it, but trusted to the veracity of the defendant. And many reasons may occur why the defendant might know that fact better than the plaintiffs; as if there had before this event subsisted a partnership between him and Falch

which had been dissolved; but at any rate it is stated as a fact that he knew it. It is admitted that a fraudulent affirmation, when the party making it has an interest, is a ground of action, as in *Risney* v. *Selby*, which was a false affirmation made to a purchaser as to the rent of a farm which the defendant was in treaty to sell to him. But it was argued that the action lies not unless where the party making it has an interest, or colludes with one who has. I do not recollect that any case was cited which proves such a position; but if there were any such to be found, I should not hesitate to say that it could not be law, for I have so great a veneration for the law as to suppose that nothing can be law which is not founded in common sense or common honesty. For the gist of the action is the injury done to the plaintiff, and not whether the defendant meant to be a gainer by it; what is it to the plaintiff whether the defendant was or was not to gain by it? the injury to him is the same. And it should seem that it ought more emphatically to lie against him, as the malice is more diabolical if he had not the temptation of gain. For the same reason, it cannot be necessary that the defendant should collude with one who has an interest. But if collusion were necessary, there seems all the reason in the world to suppose both interest and collusion from the nature of the act; for it is to be hoped that there is not to be found a disposition so diabolical as to prompt any man to injure another without benefiting himself. But it is said that if this be determined to be law, any man may have an action brought against him for telling a lie, by the crediting of which another happens eventually to be injured. But this consequence by no means follows; for in order to make it actionable it must be accompanied with the circumstances averred in this count, namely, that the defendant, "intending to deceive and defraud the plaintiffs, did deceitfully encourage and persuade them to do the act, and for that purpose made the false affirmation, in consequence of which they did the act." Any lie accompanied with those circumstances I should clearly hold to be the subject of an action; but not a mere lie thrown out at random without any intention of hurting anybody, but which some person was foolish enough to act upon; for the *quo animo* is a great part of the gist of the action. Another argument which has been made use of is, that this is a new case, and that there is no precedent of such an action. Where cases are new in their principle, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case which may arise two centuries hence, as it was two centuries ago; if it were not, we ought to blot out of our law-books one fourth part of the cases that are to be found in them. The same objection might, in my opinion, have been made with much greater reason in the case of *Coggs* v. *Barnard;* for there the defendant, so far from meaning an injury,

meant a kindness, though he was not so careful as he should have been in the execution of what he undertook. And indeed the principle of the case does not, in my opinion, seem so clear as that of the case now before us, and yet that case has always been received as law. Indeed, one great reason, perhaps, why this action has never occurred may be that it is not likely that such a species of fraud should be practised unless the party is in some way interested. Therefore I think the rule for arresting the judgment ought to be discharged.

Lord Kenyon, C. J. I am not desirous of entering very fully into the discussion of this subject, as the argument comes to me quite exhausted by what has been said by my brothers. But still I will say a few words as to the grounds upon which my opinion is formed. All laws stand on the best and broadest basis which go to enforce moral and social duties. Though, indeed, it is not every moral and social duty the neglect of which is the ground of an action. For there are, which are called in the civil law, duties of imperfect obligation, for the enforcing of which no action lies. There are many cases where the pure effusion of a good mind may induce the performance of particular duties, which yet cannot be enforced by municipal laws. But there are certain duties, the non-performance of which the jurisprudence of this country has made the subject of a civil action. And I find it laid down by the Lord Ch. B. Comyns (Com. Dig. tit. *Action upon the Case for a Deceit*, A. 1), that "an action upon the case for a deceit lies when a man does any deceit to the damage of another." He has not, indeed, cited any authority for his opinion; but his opinion alone is of great authority, since he was considered by his contemporaries as the most able lawyer in Westminster Hall. Let us, however, consider whether that proposition is not supported by the invariable principle in all the cases on this subject, In 3 Bulstr. 95, it was held by Croke, J., that "fraud without damage, or damage without fraud, gives no cause of action; but where these two do concur, there an action lieth." It is true, as has been already observed, that the judges were of opinion in that case that the action did not lie on other grounds. But consider what those grounds were. Dodderidge, J., said: "If we shall give way to this, then every carrier would have an action upon the case; but he shall not have any action for this, because it is merely his own default that he did not weigh it." Undoubtedly, where the common prudence and caution of man are sufficient to guard him, the law will not protect him in his negligence. And in that case, as reported in Cro. Jac. 386, the negligence of the plaintiff himself was the cause for which the Court held that the action was not maintainable. Then, how does the principle of that case apply to the present? There are many situations in life, and particularly in the commercial world, where a man cannot by any diligence inform himself of the degree of credit which ought to be given to the persons with whom he deals; in which cases he must apply to those whose sources of intelligence enable them to give that information. The law of prudence leads him to apply to them; and

the law of morality ought to induce them to give the information required. In the case of Bulstrode, the carrier might have weighed the goods himself; but in this case the plaintiffs had no means of knowing the state of Falch's credit but by an application to his neighbors. The same observation may be made to the cases cited by the defendant's counsel respecting titles to real property. For a person does not have recourse to common conversation to know the title of an estate which he is about to purchase; but he may inspect the title-deeds; and he does not use common prudence if he rely on any other security. In the case of Bulstrode, the Court seemed to consider that *damnum* and *injuria* are the grounds of this action; and they all admitted that, if they had existed in that case, the action would have lain there; for the rest of the judges did not controvert the opinion of Croke, J., but denied the application of it to that particular case. Then it was contended here that the action cannot be maintained for telling a naked lie; but that proposition is to be taken *sub modo*. If, indeed, no injury is occasioned by the lie it is not actionable; but if it be attended with a damage, it then becomes the subject of an action. As calling a woman a whore, if she sustain no damage by it, is not actionable; but if she lose her marriage by it, then she may recover satisfaction in damages. But in this case the two grounds of the action concur; here are both the *damnum et injuria*. The plaintiffs applied to the defendant, telling him that they were going to deal with Falch, and desiring to be informed of his credit, when the defendant fraudulently, and knowing it to be otherwise, and with a design to deceive the plaintiffs, made the false assertion which is stated on the record, by which they sustained a considerable damage. Then, can a doubt be entertained for a moment but that this is injurious to the plaintiffs? If this be not an injury, I do not know how to define the word. Then, as to the loss; this is stated in the declaration, and found by the verdict. Several of the words stated in this declaration, and particularly *fraudulenter*, did not occur in several of the cases cited. It is admitted that the defendant's conduct was highly immoral and detrimental to society. And I am of opinion that the action is maintainable on the grounds of deceit in the defendant, and injury and loss to the plaintiffs.

Rule for arresting the judgment discharged.[1]

[1] By "Lord Tenterden's Act," 9 Geo. IV. ch. 14, s. 6, it is provided, that no action shall be brought to charge any person upon any representation made concerning the character, conduct, credit, ability, trade, or dealings of any other person, to the intent that such other person may obtain credit, money, or goods, unless such representation be made in writing, signed by the party to be charged therewith." Statutes of a similar nature have been enacted in some of the United States. — Ed.

SECTION II.

Nature of Representation.

LONG *v.* WOODMAN

1870. 58 *Maine*, 49.[1]

CASE for deceit. The declaration was, in substance, as follows: — Defendant, on, etc., with intent then and there to cheat and defraud plaintiff, together with one Reed, induced plaintiff to convey to defendant and Reed certain real estate, by then and there lending to plaintiff a certain sum of money, and by promising and causing plaintiff to believe that defendant and Reed would then and there, as a part of the same transaction, execute and deliver to plaintiff a bond to reconvey to plaintiff in two years, in payment of the loan and interest; yet defendant and Reed, intending wickedly and fraudulently to cheat, deceive, and defraud plaintiff, after obtaining said deed from plaintiff, refused then and there to execute and deliver such bond; and defendant, though tendered, at the expiration of two years, the full amount due, refused (with the same intent to defraud plaintiff) to reconvey.

Special demurrer to the declaration. In the lower court the demurrer was sustained and plaintiff excepted.

Davis & Drummond and *Bonney & Pullen*, for plaintiff.

A. Merrill, for defendant.

APPLETON, C. J. . . . To entitle a party to maintain an action for deceit by means of false representations, he must, among other things, show that the defendant made false and fraudulent assertions, in regard to some fact or facts material to the transaction in which he was defrauded, by means of which he was induced to enter into it. The misrepresentation must relate to alleged facts or to the condition of things as then existent. It is not every misrepresentation, relating to the subject-matter of the contract, which will render it void or enable the aggrieved party to maintain his action for deceit. It must be as to matters of fact, substantially affecting his interests, not as to matters of opinion, judgment, probability, or expectation. *Hazard* v. *Irwin*, 18 Pick. 95. An assertion respecting them is not an assertion as to any existent fact. The opinion may be erroneous; the judgment

[1] Statement abridged. Part of opinion omitted; also citations of counsel. — ED.

may be unsound; the expected contingency may never happen; the expectation may fail. An action of tort, for deceit in the sale of property, does not lie for false and fraudulent representations concerning profits that may be made from it in the future. *Pedrick* v. *Porter*, 5 Allen, 324. An action for deceit in the sale of real estate cannot be sustained by proof of fraudulent misrepresentations as to the price paid by the vendor. *Hemmer* v. *Cooper*, 8 Allen, 334.

So in criminal law, to sustain an indictment for cheating by false pretences, there must be direct and positive assertion as to some existing matter of fact, by which the victim is induced to part with his money or property. A false representation, promissory in its nature, as to pay money or do some other act, has never been held to be the foundation of a criminal charge. *Ranney* v. *The People*, 22 N. Y. 413. In an indictment for obtaining goods under false pretences, no statement of anything to take place in the future will constitute a pretence within the meaning of the statute. *Glackan* v. *Com.*, 3 Met. (Ky.) 232. A representation or assurance in relation to a future event is not a statutory false pretence. *State* v. *Magee*, 11 Ind. 154.

Here the defendant, when or after he obtained his deed, promised "to make, execute, and deliver a good and sufficient bond," to reconvey, upon certain conditions, the land conveyed to him and Reed, which upon request he refused to do. Here is no false representation or concealment of an existent fact. Yet this is the gist of the plaintiff's complaint, that a promise made has not been performed. Had it been performed, the plaintiff had no case.

Here is a promise to do some future act; but whether it be to pay money or give a bond is immaterial. If the promise had been to pay a sum of money instead of giving a bond no action for deceit could have been maintained, though the money was not paid at the stipulated time. This case in no respect differs from a broken promise to pay for goods sold. The goods are delivered upon the expectation that the promise to pay will be performed. The deed was given upon the expectation that the bond would be delivered in accordance with the promise of the grantee.

The declaration sets forth a promise to deliver a certain bond as therein described. It does not state whether it is in writing or not. There is no special plea denying it to be in writing. *Lawrence* v. *Chase*, 54 Maine, 196. If the promise was in writing, it was for a sufficient consideration, and the plaintiff may maintain an action thereon.

If not in writing it would be void by the statute of frauds. *Lawrence* v. *Chase*, 54 Maine, 196. But a verbal promise within the statute is no false representation. It is a promise for the violation of which the law fails to provide a remedy in case of its non-performance. In *Fisher* v. *New York C. P.*, 18 Wend. 608, the facts were somewhat similar to those in the case at bar. The plaintiff below leased certain premises to the defendant, and promised to make repairs thereon,

which he refused to do. Mr. Justice Cowen, in delivering the opinion of the Court, uses the following language: "Fraud cannot be predicated of a promise not performed, for the purpose of avoiding a written instrument, or a bargain of any kind. This case is no more. A contrary doctrine would avoid almost every contract for a breach of which a suit is to be brought. I have only to say that the tenant and defendant below were content to take the plaintiff's word. If that was not legally obligatory, then there has been a mistake of the law; but the defendant could not set that up as fraud." The case of *Com.* v. *Brennerman*, 1 Rawle, 314, resembles the present. In delivering the opinion of the Court, Rogers, J., says, "There is no doubt that in the breach of promise, Henry Brennerman, in a moral point of view, was guilty of fraud; but it was no more fraudulent than any other breach of trust or promise. There was no false representation or concealment of any existing fact, which constitutes the legal idea of fraud." *Exceptions overruled.*

STATE v. GORDON.

1895. 56 *Kansas*, 64.[1]

GORDON was convicted and sentenced in the District Court upon a charge of obtaining money from Trenier on false pretences. He appealed from the judgment.

The facts alleged and proved were, in brief, as follows: —

Gordon represented to Trenier that Gordon and a certain Indian owned and possessed a gold brick of the value of $10,000; that they were about to take the brick to the United States Mint at Philadelphia to be coined into money; that the Indian would not allow the brick to be taken to the mint unless he received a certain sum of money on his interest in the brick. Gordon told Trenier that, if Trenier would give Gordon money to pay the Indian on his share in the brick, he (Gordon) would deliver said brick to Trenier to be by Trenier taken to the mint, and that Trenier should have a third interest in the money coined from the brick. Relying on these statements, Trenier gave Gordon money to pay to Indian.

It appeared that Gordon and the Indian did not own or possess a gold brick; that the representations were all known by Gordon to be false; and that they were made for the purpose of defrauding Trenier.

Waters & Waters and *W. C. Webb*, for appellant.

F. B. Dawes, Attorney-General, *H. C. Safford*, County Attorney, and *A. J. McCabe*, for State.

JOHNSTON, J. . . . The substantial features of the charge were representations and assurances of present existing facts, viz., that Gordon and the Indian were then the owners and possessors of a valuable gold brick, which they then had in Shawnee County, and that they were then on their road to take the gold brick to the United States Mint at Philadelphia to be coined. It is alleged that on the faith of these representations and the assurance of those facts the money was obtained from Trenier. The mere fact that a false pretence of an existing or past fact is accompanied by a future promise will not relieve the defendant or take the case out of the operation of the statute. Besides,

"It is not necessary, to constitute the offence of obtaining goods by false pretences, that the owner has been induced to part with his property solely and entirely by pretences which are false; nor need the pretences be the paramount cause of the delivery to the prisoner. It is sufficient if they are a part of the moving cause, and without them the defrauded party would not have parted with the property." (*In re Snyder*, 17 Kan. 542.)

[Remainder of opinion omitted.]

Judgment affirmed.

[1] Statement abridged. Only part of opinion is given. — ED.

LITTLE, J., IN HOLTON *v.* THE STATE.

1899. 109 *Georgia*, 127, p. 129.

LITTLE, J. . . . It is a sound proposition of law, that false representations, to be the basis of a prosecution for cheating and swindling, must relate either to the past or to the present. *Miller* v. *State*, 99 Ga. 207. It therefore follows, that any promise or statement as to what may occur in the future, however false, will not serve as a basis for such a prosecution, because a promise is not a pretence. *Ryan* v. *State*, 45 Ga. 128. But it by no means follows that a prosecution may not be maintained, when in connection with a promise a false representation has been made. On this subject Mr. Bishop, in his work on Criminal Law (vol. ii. sect. 424), says: "It would be difficult to find in actual life any case wherein a man parted with his property on a mere representation of fact, whether true or false, without an accompanying promise. If, therefore, we look at the promise simply as a nullity, it does not impair a simultaneous false pretence, considered as a foundation for an indictment." And, citing a number of cases, he says, in section 427, that "The conclusion to which the foregoing views leads us accords with what the English judges have held, that where the blended pretence and promise, acting together on the mind of the defrauded person, were the inducements to part with his goods, and he would not have done it by reason of the pretence alone without the promise, the case falls still within the statute." This point has, however, been exactly decided in the case of *Thomas* v. *State*, 90 Ga. 437, where the court held that the offence of cheating and swindling may be committed by a false representation of a past or existing fact, although a promise be also a part of the inducement to the person defrauded to part with his property. We understand from the evidence that the purchasers of the land testified that they would not have given their notes and received a deed if plaintiff in error had not represented to them that the title which he held was the true and genuine title and superior to any outstanding, nor would they have purchased even under this representation but for the promise that he would defend the title in the future. Under the authorities above cited, the promise may be rejected as being of no avail in this prosecution and entirely insufficient to support a conviction, but, having eliminated it, the representation as testified to remains, and if false, and the purchasers were defrauded and cheated, that representation, even though accompanied with the promise, was sufficient to support the conviction.

GALLAGHER *v.* BRUNEL.

1826. 6 *Cowen (New York)*, 346.[1]

On demurrer to the declaration. The first count stated, that on the 9th of April, 1823, Castro & Henriques proposed to purchase of the plaintiffs a quantity of cotton, at a certain price; part to be paid in cash, and part to be secured by the promissory note of the purchasers endorsed by the defendant, at four months; that C. & H. were then unable to pay for the cotton; and the plaintiffs therefore unwilling to sell all, or any part, on their sole credit; and the defendant knew this. Yet, contriving and intending to injure and defraud the plaintiffs; and to induce them to sell and deliver the cotton to C. & H; and thereby subject the plaintiffs to the loss of the balance due after the cash payment, the defendant falsely and deceitfully represented and held out to the plaintiffs, that he, the defendant, was willing to endorse the proposed note; and with the like intent, etc., falsely, fraudulently, and deceitfully encouraged and induced the plaintiffs to sell and deliver the cotton. That they did sell and deliver it, in confidence of such false, fraudulent and deceitful representation, etc., when, in truth, the defendant was then not willing, and did not mean or intend to endorse the note, or make himself responsible; nor did he then, nor had he at any time since endorsed, or made himself legally responsible. By means whereof the plaintiffs lost the cotton and the price.

The second count averred, that C. & H. were in bad credit and unfit to be trusted, at the time of the sale. But the defendant, well knowing this; and contriving and intending to defraud and injure the plaintiffs, and wrongfully and deceitfully to enable C. & H. to obtain the possession of the cotton, and convert it to their own use, without paying the plaintiffs for it; falsely, fraudulently and deceitfully represented to the plaintiffs, and gave them to understand and believe, that, in case they would sell the cotton to C. & H., the defendant would become answerable to the plaintiffs, for so much as should be unpaid, by endorsing the note or notes of C. & H., etc.; that without such representation, they would not have sold the cotton, etc. (*In other respects, this count was substantially the same as the first.*)

General demurrer and joinder.

C. D. Colden, in support of the demurrer.

P. W. Radcliff and *G. Griffin*, *contra*.

Woodworth, J. . . . The attempt here is, to sustain the action, not on a contract, which, if in writing, might perhaps be obligatory; but on a deceitful representation. If the promise was in writing, I perceive no objection to its validity, inasmuch as a good consideration is

[1] Arguments and part of opinion omitted. — Ed.

stated, viz., that if the plaintiffs would sell and deliver, the defendant would endorse. If, then, there is a binding contract existing between the parties, and on which the defendant is liable, I apprehend it is not competent for the plaintiffs to say they have an election to turn this into an action for deceit, and recover in that form, unless the case is such as to render the party liable, not only on the contract; but, in addition, contains facts sufficient to sustain an action for deceit. For example, suppose A represents B to be solvent, knowing it to be false, whereby B obtains credit; but notwithstanding this representation, the seller takes from A his written stipulation to guaranty the payment. In this case, I perceive no objection to a creditor's election of the remedy. The fraudulent representation of solvency would sustain the action for deceit. The written guaranty would support an action on the contract. It seems, therefore, immaterial here, whether the plaintiffs have or have not a demand which may be enforced in a different form. The question is, will the facts stated sustain an action for deceit?

After attentive consideration, I am inclined to think the plaintiffs are not entitled to recover. However reprehensible the conduct of the defendant may appear in a moral point of view, we cannot deny to him the protection of the common law; which does not reach cases of imperfect obligation. If this be an attempt on the part of the plaintiffs, to get rid of the statute of frauds, I can only say, the occasion justified the experiment, and calls for a patient and critical examination.

If this case is stripped of the general allegations in the declaration, of fraud and deceit, it appears to me that the gravamen is nothing more than that the defendant encouraged the plaintiffs to sell to Castro and Henriques; and, as surety, promised to endorse their notes. The intention of the party not to fulfil, has not, I believe, ever been considered among the fraudulent acts, which, in judgment of law, render a party liable. The maker of a promissory note may not, at the time, intend to make payment. On this note, the plaintiff may declare that the defendant intended to deceive and defraud; but it is mere matter of form, sanctioned by precedent in pleading. The maker may go farther, and on the strength of assurances to pay punctually, never intended to be performed, induce the lender to part with his money, and accept the borrower's note. All this is immoral. Still the remedy is on the contract. The law has not recognized it as the substantive ground of fraud. That no cases are to be met with in the books going the length contended for, is good evidence that the doctrine is novel, and has never been acted upon.

. . . . . .

It is evident what must be the species of fraud, for which the law gives redress; falsehood as to an existing fact. If, as Buller, J., observes, every deceit includes a lie, it follows, that the representation, and promise of the defendant are not comprised within the legal acceptation of that term. The test of a lie is, that the fact asserted is not true at the time; which cannot be predicated of the facts in this

case; for, although the defendant promised with the intent not to perform, it was not then false, nor could it be. It referred to an act to be done *in futuro*. Until the defendant had refused to endorse, it could not be said he had violated his promise.

. . . . . .

Judgment for defendant.

EDGINGTON *v.* FITZMAURICE.

1882. *Law Reports*, 29 *Chancery Division*, 459.[1]

Action against Fitzmaurice *et als.*, directors of the Army and Navy Provision Market (Limited), and against Hunt, the secretary, and Hanley, the manager, asking for the repayment by them of a sum of £1500 advanced by the plaintiff on debentures of the company, on the ground that he was induced to advance the money by the fraudulent misrepresentations of the defendants.

Plaintiff, who was a shareholder in the company, received a prospectus issued by order of the directors, inviting subscription for debenture bonds. This prospectus contained the following statement as to the objects for which the issue of debentures was made: —

"1. To enable the society to complete the present alterations and additions to the buildings, and to purchase their own horses and vans, whereby a large saving will be effected in the cost of transport.

"2. To further develop the arrangements at present existing for the direct supply of cheap fish from the coast, which are still in their infancy."

Plaintiff took debenture bonds to the amount of £1500; and testified that he relied, as one inducement, on the fact that the company wanted the money for the objects stated in the prospectus.

At the hearing before Denman, J., the plaintiff contended and offered evidence tending to show that the real object of the directors in issuing the debentures was to pay off pressing liabilities of the company, and not to complete the buildings or to purchase horses and vans, or to develop the business of the company.

Sir F. Herschell, S. G., *Rigby*, Q. C., and *Willis Bund*, for plaintiff.

Davey, Q. C., *W. W. Karslake*, Q. C., and *J. Kaye*, for Fitzmaurice.

There was no misrepresentation of any fact, and the directors merely stated their intention as to the money, which of course they might alter. There is every difference between the two: *Maddison* v. *Alderson*, 8 App. Cases, 467. Unless it amounts to a contract, a mere statement that you will do something is of no effect: *Jordan* v. *Money*, 5 H. L. C.

[1] The case has been much abridged, and the greater part of the report omitted. — Ed.

185; and if it was a contract then it was with the company, and the directors cannot be sued: *Ferguson* v. *Wilson*, L. R. 2 Chan. 77.

Crossley, Q. C., *J. Cutler*, *S. Hall*, *A. Young*, *S. Brice*, and *F. A. Lewin*, for other defendants.

Sir F. Herschell, in reply. An allegation of intention may be fraudulent: *Ex parte Whittaker*, L. R. 10 Chan. 446.

[Denman, J., delivered an elaborate opinion, substantially sustaining the plaintiff's contention. He gave judgment against the directors.]

From this judgment, Fitzmaurice and the four other directors appealed.

Davey, Q. C., *Crossley*, Q. C., and *A. Young*, for appellants.

Sir F. Herschell, S. G., *Rigby*, Q. C., and *Willis Bund*, for the plaintiff.

COTTON, L. J. [Opinion omitted.]

BOWEN, L. J. [After stating the requisites of an action for deceit, and commenting upon other alleged misrepresentations.] But when we come to the third alleged misstatement I feel that the plaintiff's case is made out. I mean the statement of the objects for which the money was to be raised. These were stated to be to complete the alterations and additions to the buildings, to purchase horses and vans, and to develop the supply of fish. A mere suggestion of possible purposes to which a portion of the money might be applied would not have formed a basis for an action of deceit. There must be a misstatement of an existing fact; but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact. Having applied as careful consideration to the evidence as I could, I have reluctantly come to the conclusion that the true objects of the defendants in raising the money were not those stated in the circular. I will not go through the evidence, but looking only to the cross-examination of the defendants, I am satisfied that the objects for which the loan was wanted were misstated by the defendants, I will not say knowingly, but so recklessly as to be fraudulent in the eye of the law.

Then the question remains: Did this misstatement contribute to induce the plaintiff to advance his money. Mr. Davey's argument has not convinced me that they did not. He contended that the plaintiff admits that he would not have taken the debentures unless he had thought they would give him a charge on the property, and therefore he was induced to take them by his own mistake, and the misstatement in the circular was not material. But such misstatement was material if it was actively present to his mind when he decided to advance his money. The real question is, what was the state of the plaintiff's mind, and if his mind was disturbed by the misstatement of the defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference. It

resolves itself into a mere question of fact. I have felt some difficulty about the pleadings, because in the statement of claim this point is not clearly put forward, and I had some doubt whether this contention as to the third misstatement was not an afterthought. But the balance of my judgment is weighed down by the probability of the case. What is the first question which a man asks when he advances money? It is, what is it wanted for? Therefore I think that the statement is material, and that the plaintiff would be unlike the rest of his race if he was not influenced by the statement of the objects for which the loan was required. The learned judge in the Court below came to the conclusion that the misstatement did influence him, and I think he came to a right conclusion.

[FRY, L. J., delivered a concurring opinion.]

Appeal dismissed.

McCOMB *v.* BREWER LUMBER COMPANY.

1903. 184 *Mass.* 276.[1]

THE third count in the declaration is tort for deceit in the sale of certain stock by the defendant to the plaintiff.

The allegations, so far as material here, are in substance as follows: —

Plaintiff says that the defendant, by its agent, with intent to deceive and defraud the plaintiff, falsely and fraudulently represented to him [here specifying certain representations] and that, if the plaintiff would purchase a certain number of shares of stock in the defendant corporation and pay therefor the sum of $9000, . . . the $9000 paid by the plaintiff should be put in the treasury of said corporation to be used as a working capital. And plaintiff says that, relying upon the representations, he bought the shares and paid therefor $9000; and plaintiff says that said representations were false and untrue to the knowledge of the defendant in this: [specifying certain particulars], and the $9000 paid by plaintiff was not put in its treasury and used as working capital, but was, with the approval of the defendant, its directors and manager, used for other purposes than the business of the defendant.

Verdict for plaintiff for $1.00 damages. Plaintiff alleged exceptions as to the ruling at the trial in reference to this count.

H. C. Joyner, for plaintiff.

C. Giddings, for defendant.

HAMMOND, J. . . . The exceptions relate only to the third count, and since the verdict was for the plaintiff on this, they are material only so far as they respect the question of damages. The principal

[1] Statement abridged. Part of opinion omitted. — ED.

difference between the instructions given by the judge and those requested by the plaintiff is that the judge declined to permit the jury to consider the allegation with reference to the promised use of the $9000 paid by the plaintiff for the stock. As to this it is contended by the plaintiff that at the time the defendant promised to use the money as working capital it did not intend to keep the promise, and that a representation of a present intention is a representation of an existing fact and therefore may be false and fraudulent. But, without implying that the plaintiff's contention would be true under any circumstances, the difficulty with his case is that the question is not raised upon the record. The ruling that the jury should not consider the allegation with reference to the promised use of the money appears to have been made with reference to the third count, and, as applied to that, it was correct. An examination of the count will show that it does not contain any allegation that at the time the defendant said that the money should be used for working capital it had not the intention to perform that promise. It first sets out the representations which induced the plaintiff to purchase the stock, then proceeds to state in what respects they were false and fraudulent and the defendant's knowledge of the falsity, and then follows the only allegation respecting the representation as to the promised use of the money: "And the nine thousand dollars paid by the plaintiff to the defendant was not put in its treasury and used as working capital, but was, with the approval of the defendant, its directors and manager, used for other purposes than the business of the defendant." This is an allegation that the defendant failed to carry out its promise, and falls far short of an allegation that the defendant at the time it was made did not intend to carry it out. There is no allegation whatever as to the intent of the defendant at the time the promise was made. Indeed it is difficult to read that count, either by itself or in connection with the other counts, without feeling that the pleader studiously avoided alleging anything as to that intent. While the evidence as to the promised use and the actual use of this money may have been admissible upon the second count, the object of which was to recover damages for breach of the promise, it was not material upon the third count, even upon the question of damages, for the reasons above stated.

. . . . . .

Exceptions overruled.

SWIFT v. ROUNDS.

1896. 19 *Rhode Island*, 527.

TRESPASS ON THE CASE for deceit. Certified from the Common Pleas Division on demurrer to the declaration. Overruled

July 6, 1896. TILLINGHAST, J. This is trespass on the case for deceit. The first count in the declaration alleges that the defendant, intending to deceive and defraud the plaintiffs, did buy of them on credit certain goods and chattels of the value of $400, the said defendant not then and there intending to pay for the same, but intending wickedly and fraudulently to cheat the plaintiffs out of the value of said goods and chattels, which said sum of $400 the defendant refuses to pay, to the plaintiffs' damage, etc. The second count, after setting out the fraudulent conduct aforesaid, alleges that the defendant thereby then and there represented that he intended to pay for said goods, but that he did not then and there intend to pay for the same, but wickedly and fraudulently intended to cheat the plaintiffs out of the value of said goods and chattels, etc.

To this declaration the defendant has demurred, and for grounds of demurrer to the first count thereof, he says, (1) that the plaintiffs do not allege any false representation by the defendant; (2) that the plaintiffs do not allege that they have acted upon any false representation of the defendant; and (3) that the plaintiffs do not allege any damage suffered by them in acting upon any false representation of the defendant.

The grounds of demurrer to the second count are, (1) that the plaintiffs do not allege any false representation by the defendant as to any fact present or past, but only as to something that would happen in the future, which, if in the future it proved not to be true, would not be the subject matter of a false representation, but simply a promise broken, and therefore not a ground of an action of deceit; (2) that the plaintiffs do not allege that they acted upon any false representation made by the defendant; and (3) that the plaintiffs do not allege that they suffered any damage by acting upon any false representation made by the defendant to the plaintiffs.

We are inclined to the opinion, after some hesitation, that the declaration states a case of deceit. Any fraudulent misrepresentation or device whereby one person deceives another, who has no means of detecting the fraud, to his injury and damage, is a sufficient ground for an action of deceit. Deceit is a species of fraud, and consists of any false representation or contrivance whereby one person overreaches and misleads another, to his hurt. And, while the fraudulent misrepresentation relied upon usually consists of statements made as to material facts, either verbally or in writing, yet it may be made by conduct as well. Grinnell on Law of Deceit, p. 35. A man may not

only deceive another, to his hurt, by deliberately asserting a falsehood, as, for instance, by stating that A. is an honest man when he knows him to be a rogue, or that a horse is sound and kind when he knows him to be unsound and vicious, but also by any act or demeanor which would naturally impress the mind of a careful man with a mistaken belief, and form the basis of some change of position by him. 1 Story, Eq. Jur. § 192. In *Ex parte Whittaker, &c.*, 10 L. R. 449, Mellish, L. J., says: "It is true, indeed, that a party must not make any misrepresentation, express or *implied*, and as at present advised I think Shackelton when he went for the goods must be taken to have made an implied representation that he intended to pay for them, and if it were clearly made out that at that time he did not intend to pay for them, I should consider that a case of fraudulent misrepresentation was shown." See also *Lobdell* v. *Baker*, 1 Met. 201; 1 Benjamin on Sales, ed. of 1888, § 524.

In the case at bar, the declaration alleges that the defendant bought the goods in question upon credit, fraudulently intending not to pay for them but to cheat the plaintiffs out of the value thereof. By the act of buying the goods of the plaintiffs the defendant impliedly promised to pay for the same, which promise was equally as strong and binding as though it had been made in words, or even in writing. The plaintiffs had the right to rely on this promise, and to presume that it was made in good faith. It turns out, however, according to the allegations aforesaid, that it was not made in good faith, but, on the contrary, was made for the purpose of deceiving the plaintiffs into the act of parting with their goods, the defendant intending by the transaction to cheat them out of the value thereof. The fraud, then, consisted in the making of the promise, in the manner aforesaid, with intent not to perform it. By the act of purchasing the goods on credit, the defendant impliedly represented that he intended to pay for them. The plaintiffs relied on this representation, which was material and fraudulent, and were damaged thereby. All the necessary elements of fraud or deceit therefore were present in the transaction. See *Upton* v. *Vail*, 6 Johns. 181; *Bartholomew* v. *Bentley*, 15 Ohio, 666; Bishop, Non-Contract Law, §§ 314–318; *Burrill* v. *Stevens*, 73 Me. 400; *Barney* v. *Dewey*, 13 Johns. 226; *Hubbel* v. *Meigs*, 50 N. Y. 491. The general doctrine which controls this action is fully reviewed by Mr. Wallace in a note to *Pasley* v. *Freeman*, 2 Smith's Lead. Cas. 101. As said by Bigelow on Fraud, page 484, "to profess an intent to do or not to do when a party intends the contrary, is as clear a case of misrepresentation and of fraud as could be made." See also p. 466 as to what constitutes a representation. In *Goodwin* v. *Horne*, 60 N. H. 486, the court say: "Ordinarily false promises are not fraudulent, nor evidence of fraud, and only false representations of past or existing facts are actionable or can be made the ground of defence. . . . But when a promise is made with no intention of performance, and for the very purpose of accomplishing a fraud, it is a most apt and effectual means

to that end, and the victim has a remedy by action or defence. Such are cases of concealed insolvency and purchases of goods with no intention to pay for them." In *Byrd* v. *Hall*, 1 Abb. A. D. 286, it was held that, although a purchase of goods on credit by one who knows himself to be insolvent is not fraudulent, yet where it is made with a preconceived design not to pay, it is fraudulent. See also *Milliken* v. *Miller*, 12 R. I. 296; *Thompson* v. *Rose*, 16 Conn. 81; *Hennequin* v. *Naylor*, 24 N. Y. 129; *Devoe* v. *Brandt*, 53 N. Y. 465; Story on Sales, 2d ed. § 176, and cases in note 2; *Douthitt* v. *Applegate*, 33 Kans. 395; *Morrill* v. *Blackman*, 42 Conn. 324; *Skinner* v. *Flint*, 105 Mass. 528; *Earl of Bristol* v. *Wilsmore*, 2 Dow. & Ry. 760; *Lobdell* v. *Baker*, 1 Met. 193; Cooley on Torts, 2d ed. 559; *Load* v. *Green*, 15 M. & W. 215. In short, the making of one state of things to appear, to those with whom you deal, to be the true state of things, while you are acting on the knowledge of a different state of things — among the oldest definitions of fraud in contracts — is exemplified in this case. See *Lee* v. *Jones*, 17 C. B. N. S. 494. The defendant made it to appear, by the act of buying on credit, that he intended to pay for the goods in question, while in fact he intended to cheat the plaintiffs out of them. And to hold that such a transaction does not amount to fraud, would be to make it easy for cheats and swindlers to escape the just consequence of their unrighteous acts.

We have hesitated somewhat in arriving at the conclusion that an action of deceit will lie, upon the facts set out in the declaration, for the reason that, amongst the numerous cases of fraud and deceit to be found in the books, we have not been referred to any, nor have we been able to find any, where the action of deceit was based simply on the act of buying goods on credit, intending not to pay for them. In *Lyons* v. *Briggs*, 14 R. I. 224, which was an action of deceit, Durfee, C. J., intimates, however, that deceit would lie in a case like the one before us, by the use of the following language: "It is not alleged that the buyer did not intend to pay when he bought, but only that he falsely and fraudulently asserted that he could be safely trusted." But the authorities are overwhelming to the effect that it is fraud to purchase goods intending not to pay for them, and that the vendor, upon discovering the fraud, may repudiate the sale and reclaim the property, or may sue in trover, or in some other action of tort, for the damages sustained by the fraud. And this being so, we fail to see why an action of deceit, which is an action of tort, based on fraud, may not lie as well. For to obtain goods on credit, intending not to pay for them, is as much a trick or device as it would be falsely to represent in words any material fact whereby the vendor should be induced to part therewith.

But defendant's counsel contends that the alleged representation was not as to any fact present or past, but merely as to what the defendant would do in the future with reference to paying for the goods, and that to say what one intends to do is identical to saying

what one will do in the future, which amounts simply to a promise; and, furthermore, that a representation of what will happen in the future, even if not realized, is not such a representation as will support this action. We do not assent to this method of reasoning. The state of a man's mind at a given time is as much a fact as is the state of his digestion. Intention is a fact; *Clift* v. *White*, 12 N. Y. 538; hence a witness may be asked with what intent he did a given act. *Seymour* v. *Wilson*, 14 N. Y. 567. A man who buys and obtains possession of goods on credit, intending not to pay for them, is then and there guilty of fraud. The wrong is fully completed and no longer exists in intention merely, and a cause of action instantly accrues thereon in favor of the vendor to recover for the wrong and injury sustained. It is true the purchaser may afterwards repent of the wrong and pay for the goods, and the vendor may never know of the wrongful intent. But this does not alter the case at all as to the original wrong and the liability incurred thereby. Of course a mere intention to commit a crime or to do a wrong is no offence. But when the intention is coupled with the doing or accomplishment of the act intended, that moment the wrong is perpetrated and the corresponding liability incurred. See *Oswego Starch Factory* v. *Lendrum*, 57 Iowa, 573.

In *Stewart* v. *Emerson*, 52 N. H. 301, where it was alleged, in reply to the defendant's plea of discharge in bankruptcy, that the debt in question was created by the fraud of the defendant, Doe, J., in the course of a long and vigorous opinion, used the following language, which is so apt and pertinent that we quote it. He said: "When the intent not to pay is concealed, the intent to defraud is acted out. The mere omission of A. to disclose his insolvency might not be satisfactory proof of a fraudulent intent in all cases. He might expect to become solvent. He might intend to pay all his creditors. He might intend to pay B. though unable to pay others. His fixed purpose *never* to pay B. is a very different thing from his present inability to pay all or any of his creditors. A man may buy goods, with time for trying to pay for them, on the strength of his known or inferred disposition to pay his debts, his habits, character, business capacity, and financial prospects, without his present solvency being thought of, and even when his present insolvency is known to the vendor. But who could obtain goods on credit, with an unconcealed determination that they should never be paid for? The concealment of such a determination is conduct which reasonably involves a false representation of an existing fact, is not less material than a misrepresentation of ability to pay (*Bradley* v. *Obear*, 10 N. H. 477), and is an actual artifice, intended and fitted to deceive."

"An application for or acceptance of credit, by a purchaser, is a representation of the existence of an intent to pay at a future time, and a representation of the non-existence of an intent not to pay. What principle of law requires a false and fraudulent representation

to be express, or forbids it to be fairly inferred from the act of purchase? A representation of a material fact, implied from the act of purchase, and inducing the owner of goods to sell them, is as effective for the vendee's purpose as if it had been previously and expressly made. If it is false, and known to the pretended purchaser to be false, and is intended and used by him as a means of converting another's goods to his own use without compensation, under the false pretence of a purchase, why does it not render such a purchase fraudulent? When the intent is to pay, it is necessarily understood by both parties, and need not be expressly represented as existing. When the intent is not to pay, it is of course concealed. Whether the deceit is called a false and fraudulent representation of the existence of an intent to pay, or a fraudulent concealment of the existence of an intent not to pay, the fraud described is, in fact, one and the same fraud."

Demurrer overruled, and case remitted to the Common Pleas Division for further proceedings.

Willard B. Tanner, for plaintiffs.

Robert W. Burbank, for defendant.

PETERS, J., IN BURRILL *v.* STEVENS.

1882. 73 *Maine*, 398–400.

THE instructions to the jury upon that point present the question, whether getting property by a purchase upon credit, with an intention of the purchaser never to pay for the same, constitutes such a fraud as will entitle the seller to avoid the sale, although there are no fraudulent misrepresentations or false pretences.

The question has never been fairly before this Court before this time, so as to require a deliberate decision. The plaintiff contends that the question was settled in the negative in the case of *Long* v. *Woodman*, 58 Maine, 49. But that case falls short of meeting the question presented in the present case. The gist of the charge against the purchaser in that case seems to have been that he fraudulently refused to do after the contract what he agreed to do at the time of the contract, the alleged fraud being an intention formed after the contract rather than contemporaneously with it; and that was an action of deceit based upon a broken promise to convey real estate. Of late years, *nisi prius* rulings in our own Courts have frequently been in accordance with the law as delivered to the jury by the presiding judge in the case at bar, and we think the doctrine may safely be accepted and approved, both upon authority and principle.

It is the admitted doctrine of the English cases, and is sustained by most of the courts in the United States. In Benj. on Sales (2d Amer. ed), § 440, note e, very numerous cases are cited to the proposition. *Stewart* v. *Emerson*, 52 N. H. 301, discusses the question at length, and reviews many authorities.

The plaintiff relies upon the objection that it is not an indictable fraud, an argument which seems to have inclined the Pennsylvania Court against admitting the principle into the jurisprudence of that State. *Smith* v. *Smith*, 21 Pa. St. 367; *Backentoss* v. *Speicher*, 31 Pa. St. 324. It has been held by some Courts to be an indictable cheat, the false pretence being in the vendee's pretendingly making a purchase, while his only purpose is to cheat the vendor out of his goods. It is more often considered, however, as not a matter for indictment. Bish. Crim. Law, § 419. But the objection taken by the plaintiff has generally been considered as insufficient to override the rule.

But the doctrine governing the case before us should not be misunderstood. To constitute the fraud, there must be a preconceived design never to pay for the goods. A mere intent not to pay for the goods when the debt becomes due, is not enough; that falls short of the idea. A design not to pay according to the contract is not equivalent to an intention never to pay for the goods, and does not amount to an intention to defraud the seller outright, although it may be evidence of such a contemplated fraud.

Nor is it enough to constitute the fraud that the buyer is insolvent, and knows himself to be so, at the time of the purchase, and conceals the fact from the seller, and has not reasonable expectations that he can ever pay the debt.[1] Some Courts have gone so far as to denominate that a fraud which will avoid the sale. And it may have been so held in bankruptcy Courts, in some instances, as between a vendor and the assignee of the vendee. But it would not, generally, be enough to prove the fraud. The inquiry is not whether the vendee had reasonable grounds to believe he could pay the debt at some time and in some way, but whether he intended in point of fact not to pay it.

Nor is it enough that after the purchase the vendee conceives a design and forms a purpose not to pay for the goods, and successfully avoids paying for them. The only intent that renders the sale fraudulent is a positive and predetermined intention, entertained and acted upon at the time of going through the forms of an apparent sale, never to pay for the goods. *Cross* v. *Peters*, 1 Greenl. 378; *Biggs* v. *Barry*, 2 Curtis (C. C. R.), 259; *Parker* v. *Byrnes*, 1 Low. 539; *Rowley* v. *Bigelow*, 12 Pick. 306.

Riddick, J., in BUGG *v.* WERTHEIMER-SCHWARTZ SHOE COMPANY.

1897. 64 *Arkansas*, 12, pp. 17, 18.

Riddick, J. . . . Nor can we sustain the contention of appellant that to entitle the vendor to avoid a sale after delivery it must in all cases be shown that the vendee did not intend to pay for the goods.

[1] See *Syracuse K. Co.* v. *Blanchard*, 69 N. H. 447. — Ed.

That is, as above stated, one ground on which the sale may be avoided, but not the only one. If the vendee knowingly makes false representations concerning material facts, and thus induces the seller to part with his goods, the seller may elect to avoid the sale, and this without regard to whether the buyer intended to pay for the goods or not. The fraud in such a case consists in inducing the vendor to part with his goods by false statements of the buyer, known to be false when made, or made by him when he has no reasonable ground to believe that they are true. If a vendor parts with his goods on the faith of such false statements made by the buyer, it would be strange if the law permitted the buyer to reap the fruits of such conduct, and retain the goods against the will of the vendor. To illustrate, let us suppose a case. A man with no property, but with great faith in his ability as a merchant, goes to a city and calls on a wholesale merchant for the purpose of buying a stock of goods. He believes that if he can obtain a stock of goods, his experience and ability will soon enable him to pay off the purchase price, but, fearing that the merchant may refuse to sell if he learns that he has no property, he thereupon, for the purpose of obtaining the goods, states to the merchant that he has money in the bank, and owns a large amount of both real and personal property. The merchant, ignorant of the facts, and relying on the truth of these statements, parts with his goods. He afterwards discovers the fraud, and brings an action to recover the goods. In such a case would it be a valid defence for the buyer to say that, although he had secured the goods by misrepresentation, yet he did honestly intend to pay for them? Clearly it would not. The courts would answer such a question substantially as it was answered by the Supreme Court of Connecticut when it said that the intent of the buyer to pay "may have lessened the moral turpitude of his act, but it will not suffice to antidote and neutralize an intentionally false statement which had accomplished its object of benefiting himself and of misleading the plaintiffs to their injury." *Judd* v. *Weber*, 55 Conn. 267; *Reid* v. *Cowduroy*, 79 Iowa, 169; s. c. 18 Am. St. Rep. 359, and note; *Strayhorn* v. *Giles*, 22. Ark. 517.

Bowen, L. J., in SMITH *v.* LAND, &c. CORPORATION.

1884. *Law Reports*, 28 *Chancery Division*, 15–16.

In considering whether there was a misrepresentation, I will first deal with the argument that the particulars only contain a statement

of opinion about the tenant. It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion. Now a landlord knows the relations between himself and his tenant; other persons either do not know them at all or do not know them equally well, and if the landlord says that he considers that the relations between himself and his tenant are satisfactory, he really avers that the facts peculiarly within his knowledge are such as to render that opinion reasonable. Now are the statements here statements which involve such a representation of material facts? They are statements on a subject as to which *prima facie* the vendors know everything and the purchasers nothing. The vendors state that the property is let to a most desirable tenant; what does that mean? I agree that it is not a guarantee that the tenant will go on paying his rent, but it is to my mind a guarantee of a different sort, and amounts at least to an assertion that nothing has occurred in the relations between the landlords and the tenant which can be considered to make the tenant an unsatisfactory one. That is an assertion of a specific fact. Was it a true assertion? Having regard to what took place between Lady Day and Midsummer, I think that it was not. On the 25th of March, a quarter's rent became due. On the 1st of May, it was wholly unpaid and a distress was threatened. The tenant wrote to ask for time. The plaintiffs replied that the rent could not be allowed to remain over Whitsuntide. The tenant paid on the 6th of May £30, on the 13th of June £40, and the remaining £30 shortly before the auction. Now could it, at the time of the auction, be said that nothing had occurred to make Fleck an undesirable tenant? In my opinion a tenant who had paid his last quarter's rent by driblets under pressure must be regarded as an undesirable tenant.

HARVEY *v.* YOUNG.

39 *Elizabeth, Yelverton*, 21 *a.*

J. S. had a term for years, and there being a discourse between him and J. D. about buying that term, J. S. said and affirmed to J. D. that the term was worth £150 to be sold, upon which J. D. gave J. S. £150 for the term; and afterwards J. D. offered and endeavored to sell the term again, and could not obtain, nor get for the term £100, whereupon he brought an action on the case in nature of a deceit against J. S. and declared *ut supra*, and that J. S. *asseruit* to him that the term was worth so much, to which assertion J. D., *fidem adhibens*, did buy the term for so much money, but could not sell it again for so much money as was given at first, in fraud and deceit of the plaintiff to his damages, &c.; and upon not guilty pleaded it was found for the plaintiff, and alleged in arrest of judgment that the matter precedent did not prove any fraud; for it was but the defendant's bare assertion that the term was worth so much, and it was the plaintiff's folly to give credit to such assertion. But if the defendant had warranted the term to be of such value to be sold, and the plaintiff had thereupon given and disbursed his money, there it is otherwise; for the warranty given by the defendant is a matter to induce confidence and trust in the plaintiff. Between Harvey and Young, Mich. 39 Eliz., as Towes of the Inner Temple said at the bar, and that he was of counsel with the defendant, *Quod nota.*

EKINS *v.* TRESHAM.

15 *Car* 2. 1 *Levinz*, 102.

Case, That whereas the plaintiff and defendant were in treaty for the sale of a messuage; the defendant falsely and fraudulently affirmed it was let at £42 per annum; whereto the plaintiff gave faith, gave him £500 for it, where in truth it was let at £32 per annum only. After verdict for the plaintiff, it was moved in arrest of judgment that the action did not lie; as for saying that a thing is of a greater value than it is, without warranty no action lies. Yelv. 20. No more will it for saying that it is demised for more than in truth it is; for the party might inform himself from the tenant, and a warranty will not bind a man in a thing that is apparent; as to warrant that a horse has both his eyes, when he is apparently blind of one of them. But by the Court, tho' an action will not lie for saying that a thing is of greater value than it is (nor by Wyndham, it is perjury to swear it, because value consists in judgment and estimation, wherein men many times differ); yet to affirm

that a thing is demised for more than it is is a falsity in his own knowledge, and the party who is deceived may for such deceit have an action, for perhaps the lease is by parol, or the tenant will not inform the purchaser what rent he gave. And after it had been twice moved judgment was given for the plaintiff in Trinity, 15 Car. 2, by the whole Court.

DORR *v.* CORY.

1899. 108 *Iowa*, 725.[1]

APPEAL from Polk District Court.

Action at law on contracts in writing for the purchase of interests in real estate. Answer alleges (*inter alia*) that the contracts were obtained by fraud.

Verdict for plaintiff, and judgment.

Preston & Moffit, *C. A. Bishop* and *Lore Alford*, for appellant.

Dudley, *Coffin & Byers*, and *Chas. L. Powell*, for appellee.

ROBINSON, C. J. . . . The only statement purporting to be of fact which is shown to have been false is that relating to the cost of the land. Would that statement have authorized the jury to find for the defendant? It was said in *Hemmer* v. *Cooper*, 8 Allen, 334, that "the representations of a vendor of real estate, to the vendee, as to the price he paid for it, are to be regarded in the same light as representations respecting its value. A purchaser ought not to rely upon them; for it is settled that even when they are false, and uttered with a view to deceive, they furnish no ground of action." That rule was followed in *Cooper* v. *Lovering*, 106 Mass. 77, and it is the rule of *Tuck* v. *Downing*, 76 Ill. 71, and *Banta* v. *Palmer*, 47 Ill. 99. In *Holbrook* v. *Connor*, 60 Me. 578, it was said: "The statement of the vendor that he paid a certain price for the land, if true, can be no more than an indication of his opinion of its value; and when we consider the various motives which may, and often do, actuate men in making their purchases, and especially when it is done for speculation, it is but the slightest proof of such opinion." As a general rule, a vendee has no right to rely upon the statements of the vendor respecting the value of the property sold, but must act upon his own judgment, or seek information for himself. But to that rule there are exceptions. It was said in *Simar* v. *Canaday*, 53 N. Y. 306, that where statements as to value are mere matters of opinion and belief, no liability is created by uttering them, but that such statements "may be, under certain circumstances, affirmations of fact. When known to the utterer to be untrue, if made with the intention of misleading the vendee, if he does rely upon them, and is misled to his injury, they avoid the contract." The fraud which

[1] Only part of the case is given. — ED.

vitiates a contract must be material, affecting the very essence of the contract; but ordinarily, "if the fraud be such that, had it not been practiced, the contract would not have been made, then it is material to it." 2 Parsons, Contract, 770. See, also, 2 Pomeroy Equity Jurisprudence, section 878, and notes. That rule was applied in *Smith* v. *Countryman*, 30 N. Y. 656, which was an action upon a contract for the sale of hops. It was held that a false representation made by the vendee as to the price at which he had purchased hops of another person, which was relied upon by the vendor, and induced him to enter into the contract of sale, was material, and constituted a defence to an action on the contract. This rule appears to us to be in harmony with reason and the principles of justice. The price at which property actually sells in the open market is very satisfactory evidence of its value at the time of the sale. We cannot assent to the proposition that the statement of a vendor that he paid a specified price for the property he sells is a mere expression of opinion, upon which the purchaser has no right to rely. On the contrary, we think it is a statement of fact; and if the purchaser, without knowing or having reason to know what price was paid, relies upon the false statement, to his injury, he is entitled to relief. The cases of *Teachout* v. *Van Hoesen*, 76 Iowa, 113; *Iler* v. *Griswold*, 83 Iowa, 442, and *Coles* v. *Kennedy*, 81 Iowa, 360, although not precisely in point, tend to sustain our conclusion. See *French* v. *Ryan*, 104 Mich. 625 (62 N. W. Rep. 1016); *Moon* v. *McKinstry*, 107 Mich. 668 (65 N. W. Rep. 546), and *Woolen Co.* v. *Smalley*, 111 Mich. 321 (69 N. W. Rep. 722).

. . . . . .

Judgment reversed.

BRONSON, J., IN VAN EPPS *v.* HARRISON.

1843. 5 *Hill* (*New York*), 63, pp. 70, 71.

BRONSON, J. . . . If an affirmation concerning the cost of the property was of any consequence, I think the defendant should have taken the trouble to inquire and satisfy himself. But I cannot think it a matter of any legal importance. It was only another mode of asserting that the property was of the value of $32,000; and all the books agree that no action will lie if such an affirmation prove false. It is the folly of the purchaser to trust to it. Indeed, the representation here amounts to less than a direct affirmation of value, for it only asserts that the plaintiff and another man agreed that such was the value. It would lead to great mischief to allow men to annul contracts upon such a ground. If the defendant could make out that the plaintiff was his agent in purchasing from Van Rensselaer, then what

the plaintiff said about the price he paid might be material; but not in any other point of view.

Such are my views upon this branch of the case; but my brethren are of opinion that the false affirmation concerning the price paid for the land furnishes a good ground of action. There must, therefore, be a new trial upon this point, as well as the one relating to the condition of the land.

DEMING *v.* DARLING.

1889. 148 *Massachusetts*, 504.[1]

HOLMES, J. This is an action for fraudulent representations alleged to have been made to one Dr. Jordan, the plaintiff's agent, for the purpose of inducing the plaintiff to purchase a railroad bond from the defendant. . . .

Among the representations relied on, one was that the railroad mortgaged, which was situated in Ohio, was good security for the bonds; and another was that the bond was of the very best and safest, and was an A No. 1 bond. With regard to these and the like, the defendant asked the Court to instruct the jury "that no representations which the defendant might have made or did make to Dr. Jordan in relation to the value of the bond in question, or of the railroad, its terminals, and other property which were mortgaged to secure it, with other bonds, even though false, were representations upon which Dr. Jordan ought to have relied, and are not sufficient to furnish any grounds for this action;" and also, "that each of the expressions 'and that the same' (meaning said railroad and all the property covered by the mortgage) 'was good security for said bonds,' 'that said bond was of the very best and safest, and was an A No. 1 bond,' are expressions of opinion of value, and even though false, are not such representations as Dr. Jordan had a right to rely upon, and are not enough to furnish any grounds for this action."

The Court declined to give these instructions, and instead instructed the jury that "an expression of opinion, judgment, or estimate, or a statement of a promissory nature relating to what would be in the future, so far as they were expressions of opinion, if made in good faith, however strong as expressions of belief, would not support an action of deceit."

It will be seen that the fundamental difference between the instructions given and those asked is that the former require good faith. The language of some cases certainly seems to suggest that bad faith might make a seller liable for what are known as seller's statements, apart from any other conduct by which the buyer is fraudulently induced to

[1] Portions of the opinion are omitted. — ED.

forbear inquiries. *Pike* v. *Fay*, 101 Mass. 134. But this is a mistake. It is settled that the law does not exact good faith from a seller in those vague commendations of his wares which manifestly are open to difference of opinion, which do not imply untrue assertions concerning matters of direct observation (*Teague* v. *Irwin*, 127 Mass. 217), and as to which it always has been "understood, the world over, that such statements are to be distrusted." *Brown* v. *Castles*, 11 Cush. 348, 350; *Gordon* v. *Parmelee*, 2 Allen, 212; *Parker* v. *Moulton*, 114 Mass. 99; *Poland* v. *Brownell*, 131 Mass. 138, 142; *Burns* v. *Lane*, 138 Mass. 350, 356. *Parker* v. *Moulton* also shows that the rule is not changed by the mere fact that the property is at a distance, and is not seen by the buyer. Moreover, in this case, market prices at least were easily accessible to the plaintiff.

The defendant was known by the plaintiff's agent to stand in the position of a seller. If he went no further than to say that the bond was an A No. 1 bond, which we understand to mean simply that it was a first rate bond, or that the railroad was good security for the bonds, we are constrained to hold that he is not liable under the circumstances of this case, even if he made the statement in bad faith. See, further, *Veasey* v. *Doton*, 3 Allen, 380; *Belcher* v. *Costello*, 122 Mass. 189. The rule of law is hardly to be regretted, when it is considered how easily and insensibly words of hope or expectation are converted by an interested memory into statements of quality and value when the expectation has been disappointed.

. . . . . .

Exceptions sustained.

S. K. Hamilton, for defendant.
R. Lund (*W. C. Jordan* with him), for plaintiff.

ANDREWS v. JACKSON.

1897. 168 *Massachusetts*, 266.

Tort, for deceit. The declaration alleged that the plaintiff sold and conveyed to the defendant certain real estate situate in Medford "for the sum of nineteen hundred dollars, and received in payment thereof fourteen hundred dollars in cash and four certain promissory notes all signed by one H. Joseph, amounting together to the sum of six hundred and fourteen hundredths dollars; that the defendant, to induce the plaintiff to convey said real estate to him, falsely represented to the plaintiff that the maker of said notes was a man of property, and that said notes were as 'good as gold'; that your plaintiff, believing said representations to be true, was thereby induced to convey said real estate to the defendant; that said representations were false and were known to the defendant to be false, and by reason thereof the plaintiff suffered great damage."

Trial in the Superior Court, without a jury, before Hammond, J., who found for the plaintiff; and the defendant alleged exceptions, the nature of which appears in the opinion.

The case was submitted on briefs to all the justices.

H. R. Bailey & J. H. Appleton, for the defendant.

W. P. Martin, for the plaintiff.

KNOWLTON, J. The principal question in this case is whether there was any evidence to warrant a finding that the false representations made by the defendant in regard to the notes were actionable. This finding is in these words: "I find that the defendant represented these notes to be as good as gold, and that that representation was intended by him and understood by the plaintiff, not to be an expression of opinion, but a statement of a fact of his own knowledge. I find that the notes were worthless." It is contended by the defendant that such a representation is necessarily, and as matter of law, a mere expression of opinion, for which, however wilfully false, and however damaging in the reliance placed upon it, no action can be maintained.

It is true that such a representation may be, and often is, a mere expression of opinion. But we think that it may be made under such circumstances and in such a way as properly to be understood as a statement of fact upon which one may well rely.

In *Stubbs* v. *Johnson*, 127 Mass. 219, one of the representations in regard to a note was that it was "as good as gold," and the jury were instructed that, if this was intended as a representation of the financial ability of the maker of the note, it was a statement of a material fact, for which the defendant was liable. This instruction was held erroneous "because a representation as to a man's financial ability to pay a debt may be made either as a matter of opinion, or as a matter of fact; the subject of the statement does not necessarily determine which it is. . . . It is often impossible," says Mr. Justice Colt further in the opinion, "to determine, as matter of law, whether a statement is a representation of a fact, which the defendant intended should be understood as true of his own knowledge, or an expression of opinion. That will depend upon the nature of the representation, the meaning of the language used, as applied to the subject matter, and as interpreted by the surrounding circumstances, in each case. The question is generally to be submitted to the jury." The opinion plainly implies that, if the jury had been left to determine whether there was a representation of the maker's financial ability to pay made as matter of fact and not as mere matter of opinion, they might have found against the defendant on his false representation that the note was "as good as gold." In *Belcher* v. *Costello*, 122 Mass. 189, there is also a strong intimation that the rule is as above stated. In *Safford* v. *Grout*, 120 Mass. 20, the representation set out in the declaration was that the maker of the note "was a person of ample means and ability to pay said note, and that the note was good." The plaintiff was allowed to recover. The court says of the representations, "We must presume

that they were legally sufficient to support the action; that is to say, that they were statements of facts susceptible of knowledge, as distinguished from matters of mere opinion or belief." See also *Morse* v. *Shaw*, 124 Mass. 59; *Teague* v. *Irwin*, 127 Mass. 217.

In two recent cases, *Way* v. *Ryther*, 165 Mass. 226, and *Kilgore* v. *Bruce*, 166 Mass. 136, 138, this court has expressed a disinclination to extend the rule which permits dealers to indulge with impunity in false representations of opinion.

In the case now before us the notes were turned over to the plaintiff in part payment of the agreed price for land sold to the defendant. He professed to know, and probably did know, all about the financial standing of the maker of them, who lived in Boston. The plaintiff lived in a suburban town and knew nothing of the maker. She was obliged to take the defendant's representations or to decline to deal with him until she could go to Boston and make an investigation for herself. He told her that he had lent money to the maker, and said, "Do you suppose I would lend my money to any one that was not good?"

A representation that a note is as good as gold may be founded on absolute personal knowledge of the validity of the note, and upon an equally certain knowledge of the maker's financial ability. The known facts upon which financial ability depends may be so clear and cogent as to make the consequent conclusion, which ordinarily would be a mere matter of opinion, a matter of moral certainty which can properly be called knowledge. We cannot say, as matter of law, that this representation was not intended to be, and properly understood to be, a representation of facts within the defendant's knowledge.

The case of *Deming* v. *Darling*, 148 Mass. 504, differs materially from this at bar. The property to which the representation related was one of many mortgage bonds issued by a railroad company, of which, in the language of the opinion, the "market prices at least were easily accessible to the plaintiff." The representations which were held to be insufficient on which to found an action were "in relation to the value of the bond in question, or of the railroad, its terminals, and other property which were mortgaged to secure it." The value of articles sold in market, and especially of railroad property and of railroad bonds payable in the distant future, is ordinarily only a matter of opinion. A statement of the value of such property is very different from a statement that a promissory note which is almost due is known to be valid, and that the maker of it is a person of such known integrity and financial ability that his promise to pay is as good as that of the state or nation. A statement that a note is as good as gold may be intended to represent facts of this kind.

. . . . . .

Exceptions overruled.

WILLIAMS *v.* STATE.

1908. 77 *Ohio State*, 468.[1]

ERROR to the Circuit Court of Montgomery County.

The plaintiff in error was indicted for obtaining money and property by certain false pretences, to wit: that certain real estate situate in Benton township, Pike County, being one hundred and ten acres in quantity, was then and there of the value of $11,000, and that one Martha M. Williams, then and there believing said representation of value to be true, and relying and acting upon that belief, was induced to and did purchase from the plaintiff in error, the said real estate, and accepted his deed therefor, and gave to him and one Neal Overholser in payment therefor, money and property to the amount and value of $7700, whereas, in fact, the said real estate was not then and there of the value of $11,000, and was of the value not to exceed three dollars per acre, that is, $330 in all; and that the plaintiff in error then and there knew that the value of said real estate did not exceed the sum of $330, and knew at the time he so falsely represented the value of said real estate that the same was false. To this indictment the plaintiff in error filed a motion to quash and also a demurrer, which were both overruled; and the case coming on for trial, at the close of the evidence introduced by the state, a motion was made by the defendant to instruct the jury to return a verdict of acquittal, which was overruled; and the court thereupon charged the jury, among other things, as follows: "But where the buyer relies entirely upon the representations of the seller and the seller knows that the property he is describing is of such small value as to be practically worthless, and nevertheless represents it to be worth a specified sum of great amount, and the discrepancy between the real and the represented value is so enormous as to shock the conscience; when the representation is so grossly untrue that it could not be made upon any possible foundation of belief; and when it appears that the seller was plainly seeking by means of such statement to obtain the property of the buyer and practically return no equivalent therefor, the court takes the responsibility of saying to you that you have the right, if your judgment of evidence so convinces you, to regard such representations as one of fact rather than mere opinion." The jury found the defendant guilty and judgment was rendered accordingly, which judgment was affirmed by the Circuit Court, and this proceeding in error is to reverse that judgment.

Mr. E. Thompson and *Mr. Charles H. Kumler*, for plaintiff in error.

Mr. Robert R. Nevin, prosecuting attorney; *Mr. E. G. Denlinger* and *Mr. Harry N. Routzohn*, assistants, for defendant in error.

DAVIS, J. A statement of value may be given either as an opinion or as a statement of fact. All the authorities agree that if a state-

[1] Arguments omitted.

ment of value is given as an opinion merely it cannot be regarded as a foundation for an indictment. But if the statement is made as an existing fact, when the accused knows it to be false and intends it to be an inducement to the other party, and it is so understood and relied upon by the other party, then it becomes a false representation of a material fact for which the party making the representation is indictable. Whether the representation of value is intended as an expression of opinion, or whether it was made as a statement of an existing fact which the speaker intends to be an inducement to the other party, is therefore a material question of fact to be determined by the jury.

There is no novelty in this view of the law. In *Reg* v. *Evans*, 8 Cox, C. C. 257, it was said by Pollock, C. B.: "As my brother, Crowder, J., has suggested, if the prisoner had represented the note to be of the value of £5 when she knew it was not of that value, she might have been guilty of false pretences." In *People* v. *Peckens*, 153 N. Y. 576, 591, the court say: "It is insisted that many of the representations to the complainant and her husband, which induced the making and delivery of her deed, were expressions of opinion, and although false and known to be so, no liability resulted. As a general rule, the mere expression of an opinion, which is understood to be only an opinion, does not render a person expressing it liable for fraud. But where the statements are as to value or quality, and are made by a person knowing them to be untrue, with an intent to deceive and mislead the one to whom they are made, and he is thus induced to forbear making inquiries which he otherwise would, that may amount to an affirmation of fact rendering him liable therefor. In such a case, whether a representation is an expression of an opinion or an affirmation of a fact is a question for the jury. The rule that no one is liable for an expression of an opinion is applicable only when the opinion stands by itself as a distinct thing. If it is given in bad faith, with knowledge of its untruthfulness, to defraud others, the person making it is liable, especially when it is as to a fact affecting quality or value and is peculiarly within the knowledge of the person making it. *Watson* v. *People*, 87 N. Y. 561; *Simar* v. *Canaday*, 53 N. Y. 298; *Hickey* v. *Morrell*, 102 N. Y. 454, 463; *Schumacher* v. *Mather*, 133 N. Y. 590, 595." The same view of the question is presented in *Holton* v. *State*, 109 Ga. 127, 130; and also in *People* v. *Jordan*, 66 Cal. 10, 13, 14.

Simar v. *Canaday*, 53 N. Y. 298, was a civil action for damages for an alleged fraud in inducing the plaintiffs to convey certain premises. The court, at page 306, said: "The defendant contends that the representations alleged to have been made by the defendant were not such as to afford a ground for an action. It is first insisted that the statements as to the value of the lands and of the mortgages thereon were mere matter of opinion and belief, and that no action could be maintained upon them if false. If they were such, no liability is created by the utterance of them; but all statements as to the value of pro-

perty sold are not such. They may be, under certain circumstances, affirmation of fact. When known to the utterer to be untrue, if made with the intention of misleading the vendee, if he does rely upon them and is misled to his injury, they avoid the contract. *Stebbins* v. *Eddy*, 4 Mason, 414–423. And where they are fraudulently made of particulars in relation to the estate which the vendee has not equal means of knowing, and where he is induced to forbear inquiries which he would otherwise have made, and damage ensues, the party guilty of the fraud should be liable for the damage sustained. *Medbury* v. *Watson*, 6 Metc. 246, per Hubbard, J.; and see *McClellan* v. *Scott*, 24 Wis. 81." More recently the cases of *Coulter* v. *Minion*, 139 Mich. 200, and *Scott* v. *Burnight*, 131 Ia. 507, are to the same effect.

These considerations determine every question raised upon the record and therefore the judgment of the Circuit Court is

Affirmed.

PRICE, CREW, SUMMERS and SPEAR, JJ., concur.

CRANDALL *v.* PARKS.

1908. 152 *California*, 772.[1]

ANGELLOTTI, J. Defendant appealed from a judgment rescinding a contract for the exchange of property. . . .

It is claimed that the findings are not sufficient to support the judgment. They show substantially the following facts: Plaintiff was the owner and in possession of certain land in San Diego County in this state, of the value of twenty-five hundred dollars, and certain personal property thereon of the value of two hundred and fourteen dollars. Defendant, for the purpose of inducing plaintiff to exchange the same for eighty acres of land in the State of Oregon, owned by him, and a restaurant outfit in the city of San Diego, in this state, claimed to be worth four hundred dollars, and found not to exceed two hundred and twenty-five dollars in value, represented to plaintiff that he had owned the Oregon land for about fifteen years, had lived thereon, and was well acquainted with its quality, character, and value, and that the reasonable and actual value thereof was forty dollars per acre, and also that he was the owner of the restaurant outfit, including a hot-water tank and an ice-chest or refrigerator of the value of forty dollars. The value of the Oregon land did not in fact exceed the sum of five hundred dollars, or $6.25 per acre. Neither the hot-water tank nor refrigerator belonged to defendant. Plaintiff never saw the Oregon land, and had no knowledge as to its value, nature, or quality, except the statements of defendant in regard thereto, and he had no information as to the ownership of the restaurant outfit, except that given him by defendant. Defendant knew this. An exchange of the properties was effected, plaintiff being induced to make the same solely by reason of such representations as to value and

[1] Arguments omitted; also portions of opinion. — ED.

ownership, upon which he wholly relied. Defendant well knew the plaintiff in making the exchange relied and acted solely upon these representations.

[The complaint alleged that defendant knew the representation to be untrue. This allegation was not denied by the answer; defendant resting upon a denial that he made the representation at all. If the representation was made, it was admitted, by the failure to deny knowledge of untruthfulness, that it was made with knowledge that it was untrue. Hence it was *held*, that no finding was necessary as to defendant's knowledge.]

It is claimed that the representation as to the value of the Oregon land was nothing more than a mere expression of his own opinion as to the value on the part of the defendant, and therefore that an action will not lie on account thereof. This, however, is not the effect of a fair construction of the findings. A statement as to the value of property is not always made as a mere expression of opinion upon which the other party has no right to rely. It may be a positive affirmation of a fact, intended as such by the party making it, and reasonably regarded as such by the party to whom it is made. When it is such, it is like any other representation of fact, and may be a fraudulent misrepresentation warranting rescission. The rule in regard to this matter is stated by Mr. Pomeroy as follows: "Wherever a party states a matter which might otherwise be only an opinion, and does not state it as the mere expression of his own opinion, but affirms it as an existing fact material to the transaction, so that the other party may reasonably treat it as a fact and rely and act upon it as such, then the statement clearly becomes an affirmation of fact within the meaning of the general rule, and may be a fraudulent misrepresentation." 2 Pomeroy's Equity Jurisprudence, sec. 878. He further says that the statements which most frequently come within this branch of the rule are those concerning value.

. . . . . .

That plaintiff never made or commenced any investigation for himself as to the value of the Oregon land or the ownership of the personal property, that he believed and relied solely on the statements and representations of defendant in regard thereto, and that he was induced to make the exchange solely by reason thereof, is all fully established by the findings, which are conclusive upon this appeal. We know of no reason why defendant should be allowed to maintain that plaintiff was not entitled to rely, without investigation on his part, upon a representation as to the value of land so remotely situated, which he had never seen and could not personally examine, a representation, "to the truth of which the party has deliberately pledged his faith." See *Dowd* v. *Swain*, 125 Cal. 681–684, [58 Pac. 272–274].

. . . . . .

Judgment affirmed.

SHAW, J., and SLOSS, J., concurred.

STARKWEATHER *v.* BENJAMIN.

1875. 32 *Michigan*, 305.

ERROR to Macomb Circuit.

Hubbard & Crocker and *C. A. Kent*, for plaintiff in error.

J. B. Eldredge and *A. B. Maynard*, for defendant in error.

CAMPBELL, J. This action was brought to recover damages arising from alleged misrepresentations made by Starkweather to Benjamin concerning the quantity of land in a parcel purchased from Starkweather and others, for whom he acted, and which was bought by the acre.

The defence rested mainly on the ground that the purchaser saw the land, and was as able to judge of its size as Starkweather.

We do not think the doctrine that where both parties have equal means of judging there is no fraud applies to such a case. The maxim is equally valid, that one who dissuades another from inquiry and deceives him to his prejudice is responsible. It cannot be generally true that persons can judge of the contents of a parcel of land by the eye. When any approach to accuracy is needed, there must be measurement. When a positive assurance of the area of a parcel of land is made by the vendor to the vendee with the design of making the vendee believe it, that assurance is very material, and equivalent to an assurance of measurement. In this case the testimony goes very far, and shows that the assertions and representations, which the jury must have found to be true, were of such a nature that if believed, as they were, a re-survey must have been an idle ceremony. They were calculated to deceive, and as the jury have found, they did deceive Benjamin, and he had a clear right of action for the fraud.

[Omitting remainder of opinion.] *Judgment affirmed.*

BIGELOW, C. J., IN GORDON *v.* PARMELEE.

1861. 2 *Allen* (*Mass.*), 212, pp. 214, 215.

BIGELOW, C. J. The vendors pointed out to the vendees the true boundaries of the land which they sold. This fact is established by the verdict of the jury under the instructions which were given at the trial. The defendants had therefore the means of ascertaining the precise quantity of land included within the boundaries. They omitted to measure it, or to cause it to be surveyed. By the use of ordinary vigilance and attention, they might have ascertained that the statement concerning the number of acres, on which they placed reliance,

was false. They cannot now seek a remedy for placing confidence in affirmations which, at the time they were made, they had the means and opportunity to verify or disprove. Sugd. on Vend. 6, 7; *Scott* v. *Hanson*, 1 Sim. 13; *Medbury* v. *Watson*, 6 Met. 246; *Brown* v. *Castles*, 11 Cush. 348.[1]

[1] As to the defence that there is no liability for false and fraudulent representations if they relate to questions of law, see the following cases, which were printed in the first edition of this selection: *Thompson* v. *Phœnix Ins. Co.*, 75 Maine, 55; *Eaglesfield* v. *Londonderry*, L. R. 4 Chan. Div. 693, JESSEL, M. R., pp. 702, 703; *Moreland* v. *Atchison*, 19 Texas, 303; 2 Ames & Smith's Cases on Torts, 1st ed. 544–549. Compare Pollock, Torts, 6th ed. 279; Burdick, Torts, 2d ed. 371, 372. — ED.

SECTION III.

Representation not True in Fact.

KIDNEY *v.* STODDARD.[1]

1843. 7 *Metcalf*, 252.

Trespass upon the case for an alleged fraudulent representation by the defendant as to the credit of his son, Alden D. Stoddard, Jr., in the following letter to F. Delano of New York: "Fairhaven, 9 mo. 27, 1841. Franklin Delano, Esq. My dear Sir: The bearer, my son, A. D. Stoddard, Jr., wishes to purchase a bill of goods in your city. Any assistance you can render him, by a recommendation or otherwise, will be gratefully received by him, and much oblige your obedient servant, who will take the liberty to say that A. D. S. Jr.'s contracts, of whatever nature, will unquestionably be punctually attended to. Very respectfully your friend, A. D. Stoddard."

At the trial before Wilde, J., one Ammidon testified that he was agent of the plaintiffs; that Stoddard, Jr., called on him in New York, about the 1st of October, 1841, to purchase some goods, and referred him to Delano; that the witness called on Delano, who showed said letter to him, and made statements concerning Stoddard, Senior. The witness sold the son goods which he would not have sold him, if it had not been for the letter and the statements of Delano. No part of the debt was ever paid. After the sale the plaintiff discovered that the son was a minor at the time the letter was written.

The judge instructed the jury that when a party intentionally conceals a material fact, in giving a letter of recommendation, it amounts to a false representation; that the defendant, giving a letter in this case to an unlimited amount, was bound to communicate every material fact; that if he concealed the fact that the son was a minor, with the view to give him a credit, knowing or believing that he would not get a credit if that fact was known, it was a fraud, and the plaintiff was entitled to recover; that it was immaterial whether there was any moral fraud; and that every man was presumed to know the consequences of his own acts.

The defendant's counsel requested the judge to instruct the jury, that if the defendant gave his opinion merely, he was not bound to communicate any facts; and that if he gave an honest opinion, he was not liable. But the judge refused so to instruct the jury. It was also contended by the defendant's counsel that the plaintiffs should have made an effort to recover the debt of the son.

The jury found a verdict for the plaintiffs for the amount of the

[1] Statement abridged. Parts of opinion omitted. — Ed.

goods sold, and the defendant moved for a new trial, on the ground that the jury were misdirected in matter of law.

Colby, for the defendant.

Eliot, for the plaintiffs.

HUBBARD, J.

. . . . . .

It is very certain, as has been maintained by the defendant's counsel, that a mistaken opinion, honestly given, can never be taken as a fraudulent representation. This is true in principle, and supported abundantly by authorities. But the misfortune of the defendant's case is, that the verdict of the jury rests not on the honest mistake of the defendant, but upon the ground of material concealment of a fact especially within his knowledge; a fact important to be known, as it regarded the credit of the son; a fact designedly concealed, and with the view of obtaining that credit for the son, which he, the father, knew or believed he could not obtain if that fact were known.

It needs no lengthened argument to establish the materiality of the fact. The result of this case is a sufficient witness of it. The plaintiffs were induced by the letter, from which this fact was carefully excluded, to give a credit to the son, which they would not otherwise have given; and as the direct consequence of it, they have sustained the loss set out in the declaration. Here then are proved fraud and deceit on the part of the defendant, and damage to the plaintiffs; and these facts have long been held to constitute a substantial cause of action. From the time of the judgment in the great case of *Pasley* v. *Freeman*, 3 T. R. 51, to the present day, through the long line of decisions both in England and America, the principle of that case, though with some statute modifications, remains unshaken and unimpaired.

[Remainder of opinion omitted.]

Judgment on the verdict.

LORD CAIRNS, IN PEEK *v.* GURNEY.

1873. *Law Reports*, 6 *House of Lords*, 403.

MERE non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or a purchase of shares, would in my opinion form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false.

MITCHELL, J., IN NEWELL *v.* RANDALL.

1884. 32 *Minnesota*, 172–173.

IT is doubtless the general rule that a purchaser, when buying on credit, is not bound to disclose the facts of his financial condition. If he makes no actual misrepresentations, if he is not asked any questions, and does not give any untrue, evasive, or partial answers, his mere silence as to his general bad pecuniary condition, or his indebtedness, will not constitute a fraudulent concealment. 2 Pom. Eq. Jur. § 906; Bigelow on Fraud, 36, 37. But this was not a case of mere passive non-disclosure. The object of De Laittre's inquiry clearly was to ascertain Bauman's financial condition and ability to pay. Bauman's statement was in response to that inquiry, and, when he undertook to answer, he was bound to tell the whole truth, and was not at liberty to give an evasive or misleading answer, which, although literally true, was partial, containing only half the truth, and calculated to convey a false impression. The natural construction which would, under the circumstances, be put on this statement is that he had $3,300 capital in his business. It was couched in language calculated to negative the idea that this was merely the gross amount of his assets, and that he owed debts to the extent of two-thirds or the whole of that amount. Such a statement, made under the circumstances it was, might fairly and reasonably be understood as amounting to a representation that he had that amount of capital which was and would remain available, out of which to collect any debt which he might contract with plaintiff. We think this is the way in which men would ordinarily have understood it. It is immaterial that more explicit inquiries by plaintiff would have disclosed the fact of his indebtedness. It does not lie in Bauman's mouth to say that plaintiff relied too implicitly on this general statement. To tell half a truth only is to conceal the other half. Concealment of this kind, under the circumstances, amounts to a false representation.

SECTION IV.

Defendant's Belief as to Truth of Representation.

DERRY, *et als.*, APPELLANTS, *v.* PEEK, RESPONDENT.

1889. *Law Reports*, 14 Appeal Cases, 337.[1]

THE action in this case was brought by Sir H. Peek against Mr. W. Derry, the chairman, and Messrs. J. C. Wakefield, M. M. Moore, J. Pethick, and S. J. Wilde, four of the directors of the Plymouth, Devonport and District Tramways Company, claiming damages for the fraudulent misrepresentations of the defendants whereby the plaintiff was induced to take shares in the company.

The company was incorporated in the year 1882 for making and maintaining tramways in Plymouth, Devonport, and Stonehouse. The nominal capital was £125,000 in shares of £10 each.

The Plymouth, Devonport, and District Tramways Act, 1882 (45 & 46 Vict. c. clix.), by which the company was incorporated, contained the following clause (sect. 35): —

"The carriages used on the tramways may, subject to the provisions of this Act, be moved by animal power, and, with the consent of the Board of Trade, during a period of seven years after the opening of the same for public traffic, and with the like consent during such further periods not exceeding seven years as the said board may from time to time specify in any order to be signed by a secretary or an assistant secretary of the said board, by steam-power or any mechanical power: Provided always, that the exercise of the powers hereby conferred with respect to the use of steam or any mechanical power shall be subject to the regulations set forth in the Schednle A. to this Act annexed, and to any regulations which may be added thereto or substituted therefor by any order which the Board of Trade may and which they are hereby empowered to make from time to time, as and when they may think fit, for securing to the public all reasonable protection against danger in the exercise of the powers by this Act conferred with respect to the use of steam or any mechanical power on the tramways: Provided also, that the company shall not use steam-power or any mechanical power on the said tramways unless and until they shall have obtained the previous consent in writing of the corporations [Plymouth and Devonport] therefor, and then for such terms only and subject to such conditions and regulations as the corporations may from time to time prescribe."

By sect. 64 it was provided that the company should not open any c

[1] The statement is taken from L. R. 37 Chan. Div. 541, omitting the last part. Arguments are omitted. None of the opinions are given except portions of LORD HERSCHELL'S — ED.

the tramways for public traffic without the consent of the corporations.

In October, 1882, the directors issued a prospectus which contained the following paragraph: "As by sect. 35 of the Plymouth and Devonport District Tramways Act, 1882, power is given to use either animal, steam, or mechanical means of locomotion, the directors will adopt that motive power which experience may demonstrate to be at once the most economical and effective." It did not appear that the plaintiff ever received a copy of this prospectus.

On the 1st of February, 1883, the directors of the company issued a second prospectus, which contained a heading in large type as follows: "Incorporated by special Act of Parliament 45 & 46 Vict. authorizing the use of steam or other mechanical motive power." The prospectus contained the following paragraphs: —

"One great feature of this undertaking, to which considerable importance should be attached, is, that by the special Act of Parliament obtained, the company has the right to use steam or mechanical motive power instead of horses, and it is fully expected that by means of this a considerable saving will result in the working expenses of the line, as compared with other tramways worked by horses."

"Looking to the exceptional advantages offered by this undertaking, from the dense population of the towns it traverses, the unusually favorable conditions as to motive power open to the company, and the annual dividends earned by other companies which do not enjoy such special privileges, the directors have reason to believe that the enterprise will prove highly remunerative, and the shares now for subscription offer a very favorable opportunity for a sound and progressive investment."

The defendants at the same time issued a circular letter, which was sent with the prospectus, in which it was stated that "the company by its Act enjoys the special privilege of the right to use steam-power instead of horse-power, from which it is expected considerable savings will result in the working expenses."

The plaintiff received copies of this prospectus and circular, and believing, as he alleged, that the company had an absolute right to use steam and other mechanical power, and relying upon the representations and statements in the prospectus and circular, applied on the 7th of February for 400 shares, for which he paid £4000.

About £40,000 only of the capital was subscribed; but the directors completed part of their tramway in Plymouth. The corporation of Devonport refused their consent to the company opening the completed part until the remaining portion was ready, and on the 14th of November, 1884, obtained an injunction restraining the company from so doing. When the Board of Trade were applied to, they refused to sanction the use of steam-power except over a small portion of the tramways.

The result was that the company was unable to carry out its proposed undertaking, and a petition for winding-up was presented, which was followed by a winding-up order on the 2nd of May, 1885.

The writ in this action was issued on the 4th of February, 1885, a few days after the petition for winding-up, by Sir H. Peek, against the chairman and directors named above, claiming in the first instance a rescission of the contract for shares and repayment of the money paid by him, and damages; but the writ was afterwards amended, and claimed only damages for the misrepresentations in the prospectus and circular.

The defence pleaded by the defendants was that they did not represent, or intend to represent, in the prospectus and circular, that the company had an absolute right to use steam or other mechanical power; that the plaintiff knew that the use of steam power was never, or seldom, given unconditionally to a tramway company, and that he was acquainted, or might have made himself acquainted, with the provisions of the company's special Act, which was referred to in the prospectus, and might be seen at the company's office; and they denied that the plaintiff was induced to take the shares by the representations complained of. They also pleaded that if the statements complained of were untrue, they were made by the defendants in good faith, and that they had reasonable grounds for believing them to be true: that in fact the consent of the corporation of Plymouth to the use of steam was given in June, 1883, and the consent of the Board of Trade to its being used in a portion of the tramways had also been given.

The action came on for hearing before Mr. Justice STIRLING. At this hearing the parties testified.

STIRLING, J., came to the conclusion that the directors all believed that the company had the right stated in the prospectus; and that their belief was not unreasonable, and their proceedings so reckless or careless, that they ought to be fixed with the consequences of deceit. He ordered the action to be dismissed.[1]

On appeal by plaintiff to the Court of Appeal, the judgment of STIRLING, J., was reversed by COTTON, HANNEN, and LOPES, L. J. J. They held the directors liable in this action for deceit, on the ground that they made the statement without any reasonable ground for believing it to be true. L. R. 37 Chan. Div. 541.

The defendants, Derry, *et als.*, appealed from the decision of the Court of Appeals to the House of Lords.

Sir Horace Davey, Q. C., and *Moulton*, Q. C. (*Muir Mackenzie* with them), for appellants.

Bompas, Q. C., and *Byrne*, Q. C. (*Patullo* with them), for respondent.

The House of Lords unanimously reversed the judgment of the Court of Appeal, and restored the order of STIRLING, J. Opinions were delivered by LORDS HALSBURY, WATSON, BRAMWELL, FITZGERALD, and HERSCHELL.

Portions of the opinion of LORD HERSCHELL are as follows: —

[1] The opinion of STIRLING, J., is reported in L. R. 37 Chan. Div. 550. See especially 556–558.

LORD HERSCHELL. My Lords, in the statement of claim in this action the respondent, who is the plaintiff, alleges that the appellants made in a prospectus issued by them certain statements which were untrue, that they well knew that the facts were not as stated in the prospectus, and made the representations fraudulently, and with the view to induce the plaintiff to take shares in the company.

"This action is one which is commonly called an action of deceit, a mere common-law action." This is the description of it given by Cotton, L. J., in delivering judgment. I think it important that it should be borne in mind that such an action differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite. I lay stress upon this because observations made by learned judges in actions for rescission have been cited and much relied upon at the bar by counsel for the respondent. Care must obviously be observed in applying the language used in relation to such actions to an action of deceit. Even if the scope of the language used extend beyond the particular action which was being dealt with, it must be remembered that the learned judges were not engaged in determining what is necessary to support an action of deceit, or in discriminating with nicety the elements which enter into it.

There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact, has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance he has given. *Burrowes* v. *Lock*, 10 Ves. 470, may be cited as an example, where a trustee had been asked by an intended lender, upon the security of a trust fund, whether notice of any prior incumbrance upon the fund had been given to him. In cases like this it has been said that the circumstance that the answer was honestly made in the belief that it was true affords no defence to the action. Lord Selborne pointed out in *Brownlie* v. *Campbell*, 5 App. Cas. p. 935, that these cases were in an altogether different category from actions to recover damages for false representation, such as we are now dealing with.

One other observation I have to make before proceeding to consider the law which has been laid down by the learned judges in the Court of

Appeal in the case before your Lordships. "An action of deceit is a common-law action, and must be decided on the same principles, whether it be brought in the Chancery Division or any of the Common Law Divisions, there being, in my opinion, no such thing as an equitable action for deceit." This was the language of Cotton, L. J., in *Arkwright* v. *Newbould*, 17 Ch. D. 320. It was adopted by Lord Blackburn in *Smith* v. *Chadwick*, 9 App. Cas. 193, and is not, I think, open to dispute.

In the Court below Cotton, L. J., said: "What in my opinion is a correct statement of the law is this, that where a man makes a statement to be acted upon by others which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false, that is, without any reasonable ground for believing it to be true, he is liable in an action of deceit at the suit of any one to whom it was addressed, or any one of the class to whom it was addressed, and who was materially induced by the misstatement to do an act to his prejudice." About much that is here stated there cannot, I think, be two opinions. But when the learned Lord Justice speaks of a statement made recklessly or without care whether it is true or false, that is, without any reasonable ground for believing it to be true, I find myself, with all respect, unable to agree that these are convertible expressions. To make a statement, careless whether it be true or false, and therefore without any real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement, which is nevertheless honestly believed to be true. And it is surely conceivable that a man may believe that what he states is the fact, though he has been so wanting in care that the Court may think that there were no sufficient grounds to warrant his belief. I shall have to consider hereafter whether the want of reasonable ground for believing the statement made is sufficient to support an action of deceit. I am only concerned for the moment to point out that it does not follow that it is so, because there is authority for saying that a statement made recklessly, without caring whether it be true or false affords sufficient foundation for such an action.

. . . . . .

It will thus be seen that all the learned judges [in the Court of Appeal] concurred in thinking that it was sufficient to prove that the representations made were not in accordance with fact, and that the person making them had no reasonable ground for believing them. They did not treat the absence of such reasonable ground as evidence merely that the statements were made recklessly, careless whether they were true or false, and without belief that they were true, but they adopted as the test of liability, not the existence of belief in the truth of the assertions made, but whether the belief in them was founded upon any reasonable grounds. It will be seen, further, that the Court did not purport to be establishing any new doctrine. They deemed that they were only following the cases already decided, and

that the proposition which they concurred in laying down was established by prior authorities. Indeed, Lopes, L. J., expressly states the law in this respect to be well settled. This renders a close and critical examination of the earlier authorities necessary.

. . . . . .

Having now drawn attention, I believe, to all the cases having a material bearing upon the question under consideration, I proceed to state briefly the conclusions to which I have been led. I think the authorities establish the following propositions: First, in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

I think these propositions embrace all that can be supported by decided cases from the time of *Pasley* v. *Freeman*, 2 Smith's L. C. 74, down to *Western Bank of Scotland* v. *Addie*, Law Rep. 1 H. L. Sc. 145, in 1867, when the first suggestion is to be found that belief in the truth of what he has stated will not suffice to absolve the defendant if his belief be based on no reasonable grounds. I have shown that this view was at once dissented from by Lord Cranworth, so that there was at the outset as much authority against it as for it. And I have met with no further assertion of Lord Chelmsford's view until the case of *Weir* v. *Bell*, 3 Ex. D. 238, where it seems to be involved in Lord Justice Cotton's enunciation of the law of deceit. But no reason is there given in support of the view, it is treated as established law. The *dictum* of the late Master of the Rolls, that a false statement made through carelessness, which the person making it ought to have known to be untrue, would sustain an action of deceit, carried the matter still further. But that such an action could be maintained notwithstanding an honest belief that the statement made was true, if there were no reasonable grounds for the belief, was, I think, for the first time decided in the case now under appeal.

In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds. Indeed Cotton, L. J., himself indicated, in the words I have already quoted, that he should not call it fraud. But the

whole current of authorities, with which I have so long detained your Lordships, shows to my mind conclusively that fraud is essential to found an action of deceit, and that it cannot be maintained where the acts proved cannot properly be so termed. And the case of *Taylor* v. *Ashton*, 11 M. & W. 401, appears to me to be in direct conflict with the *dictum* of Sir George Jessel, and inconsistent with the view taken by the learned judges in the Court below. I observe that Sir Frederick Pollock, in his able work on Torts (p. 243, note), referring, I presume, to the *dicta* of Cotton, L. J., and Sir George Jessel, M. R., says that the actual decision in *Taylor* v. *Ashton*, 11 M. & W. 401, is not consistent with the modern cases on the duty of directors of companies. I think he is right. But for the reasons I have given I am unable to hold that anything less than fraud will render directors or any other persons liable to an action of deceit.

At the same time I desire to say distinctly that when a false statement has been made the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out by Lord Blackburn in *Brownlie* v. *Campbell*, 5 App. Cas. p. 952, a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.

I have arrived with some reluctance at the conclusion to which I have felt myself compelled, for I think those who put before the public a prospectus to induce them to embark their money in a commercial enterprise ought to be vigilant to see that it contains such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea. I think there is much to be said for the view that this moral duty ought to some extent to be converted into a legal obligation, and that the want of reasonable care to see that statements made under such circumstances are true should be made an actionable wrong. But this is not a matter fit for discussion on the present occasion. If it is to be done the legislature must intervene and expressly give a right of action in respect of such a departure from duty. It ought not, I think, to be done by straining the law, and holding that to be fraudulent which the tribunal feels cannot properly be so described. I think mischief is likely to result from blurring the distinction between carelessness and fraud, and equally holding a man fraudulent whether his acts can or cannot be justly so designated.

It now remains for me to apply what I believe to be the law to the facts of the present case. [After reviewing the evidence of each defendant.] I cannot hold it proved as to any one of them that he knowingly made a false statement, or one which he did not believe to be true, or was careless whether what he stated was true or false. In short, I think they honestly believed that what they asserted was true,[1] and I am of opinion that the charge of fraud made against them has not been established. [Remainder of opinion omitted.][2]

CARTER, J., IN WATSON *v.* JONES.

1899. 41 *Florida*, 241, pp. 253–255.

CARTER, J. [After citing *Wheeler* v. *Baars*, 33 Florida, 696.] It is there said that the *scienter* may be proved by showing, first, actual knowledge of the falsity of the representation by defendant; second, that defendant made the statement as of his own knowledge, or in such absolute unqualified and positive terms as to imply his personal knowledge of the fact, when in truth defendant had no knowledge whether the statement was true or false; or, third, that the party's special situation or means of knowledge were such as to make it his duty to know as to the truth or falsity of the representation. Under each phase the proof must show that the statement was in fact false, and in addition, under the first, that defendant had actual knowledge that it was false; under the second, that defendant made the statement as of his own knowledge, when in fact he had no knowledge whether it was true or false, which seems to bear a close resemblance to the English rule, "without belief in its truth, or recklessly careless whether it be true or false"; and under the third, that defendant's special situation or means of knowledge were such as made it his duty to know as to the truth or falsity of the representation. From this statement it is quite evident that proof sufficient to sustain the third phase tends very strongly to sustain the idea that the defendant had

[1] For a criticism of the view that the directors all believed the statement, see 6 Law Quarterly Review, 73, and 5 Law Quarterly Review, 420–422. — ED.

[2] *Derry* v. *Peek* directly decides that an action for *deceit* cannot be sustained by proving a merely negligent misrepresentation. And it is now understood that in England, apart from statute, no action whatever will lie for negligent misrepresentation. Pollock, Torts, 8th ed., 288, 289, 293, note *a*; Pollock, Law of Fraud in British India, 93; Salmond on Torts, 419, 420; 7 Law Quarterly Review, 310.

As to whether an action ought to be allowed, under some circumstances, for negligence in the use of language, see 14 Harv. Law Review, 184 *et seq.*; *Cunningham* v. *Pease, etc., Co.*, 74 N. H. 435.

By the "Directors' Liability Act" of Aug. 18, 1890, 53 & 54 Victoria, chap. 64, directors and others issuing prospectuses are made liable, in certain cases, to compensate persons sustaining loss by reason of any untrue statement in the prospectus, unless it is proved that the parties issuing the prospectus had reasonable ground to believe, and did believe, that the statement was true. — ED.

actual knowledge of the falsity of his statement; for when it is shown that the statement was material and false, and that the defendant's situation or means of knowledge were such as to make it incumbent upon him as a matter of duty to know whether the statement was true or false, the conclusion is almost irresistible that he did know that which his duty required him to know. For this reason the law conclusively presumes from the existence of these facts that defendant had actual knowledge of the falsity of his statement, or, more properly speaking, proof of these facts is sufficient to sustain a charge of actual knowledge, dispensing with further proof upon that subject, and admitting no proof to rebut the fact of actual knowledge, but only proof to rebut the existence of the facts from which such actual knowledge is inferred. We are therefore of opinion that proof of *scienter* in the third phase does not give another or different right or ground of action from that given by proof under the first phase, but that it simply establishes the same ultimate fact, *viz.*, knowledge, by a different class of evidence, and consequently that an allegation that defendant "knew" his representation to be false is provable by evidence embraced in the third phase. In other words, an averment that defendant's situation or means of knowledge were such as made it his duty to know whether his statement was true or false, and an averment that defendant well knew his statements to be untrue, are but different methods of stating the same ultimate fact, *viz.*, knowledge.

BECKER *v.* ATCHASON.

1903. 70 *New Jersey Law*, 157.

VAN SYCKEL, J. This suit was instituted in the District Court of the city of Orange, where a verdict was rendered for the plaintiff, whereupon the defendant appealed to this court.

Questions of law only are here reviewable.

The state of the case shows that the declaration alleges a breach of warranty of soundness in the sale of a horse by defendant to plaintiff.

The declaration is not printed in the case.

The first alleged error in law is the refusal of the trial court to nonsuit the plaintiff, because he did not prove that the defendant knew of the unsoundness of the horse when he made the alleged warranty.

It is safe to assert that no case can be found in this country or in England where the declaration counts upon the breach of an absolute contract of warranty of that character in which it has been held that the plaintiff must prove the *scienter*.

The cases relied on by the defendant are *Searing* v. *Lum*, 2 South. 683; *Allen* v. *Wanamaker*, 2 Vroom, 370; *Cowley* v. *Smyth*, 17 Id. 380.

In all these cases the declaration expressly alleged deceit and charged the vendor with fraud, and it was properly held that the plaintiff must establish his cause of action as laid in his pleading.

The later case of *McGlade* v. *McCormick*, 28 Vroom, 430, was not cited on the argument.

In the opinion of the Court of Errors and Appeals, delivered by the late Chief Justice Beasley, it is stated that the record shows that the suit was in tort and that plaintiff's damages was the result of a fraudulent warranty in the sale of a horse by defendant to him.

The opinion holds that, for failure to prove a *scienter* in the defendant, the trial court properly granted a nonsuit.

By reference to the printed book in the case, found in volume 196 of cases in the Court of Errors and Appeals, it appears that the declaration set forth that the defendant, knowing said horse to be unsound, did falsely and fraudulently warrant the horse to be sound and thereby falsely and fraudulently deceived the plaintiff.

The action being in tort, founded on alleged deceit, it was incumbent on the plaintiff to sustain his action to prove the fraud.

In the case under review the action is founded upon the alleged breach of an express contract of warranty, and therefore the plaintiff's case and his right to recover was established by proving:

First. The contract of warranty.

Second. The breach of it.

Third. The resulting damages.

It was not necessary to prove a *scienter* and there was no error in the refusal to nonsuit.

[Remainder of opinion omitted.]

Judgment affirmed.[1]

CABOT *v.* CHRISTIE.

1869. 42 *Vermont*, 121.[2]

Case for false warranty in the sale of a farm. Plea, not guilty. Trial by jury, May term, 1868, Barrett, J., presiding.

The plaintiff gave evidence tending to show that he bought the farm at the time and for the price stated in the declaration, and that the defendant made representations in respect to the number of acres, as

[1] In an action of tort for deceit, alleging a false representation not amounting to a warranty, courts which follow *Derry* v. *Peek*, hold it necessary to allege and prove *scienter*.

In an action of contract for breach of warranty, it is not necessary to allege and prove *scienter*.

In an action of tort for deceit, alleging a false warranty, must the plaintiff also allege and prove *scienter*? Some authorities, in deference to precedent, hold that in such an action the allegation and proof of *scienter* is unnecessary. See *Place* v. *Merrill*, 14 R. I. 578, and cases collected in Williston on Sales, section 197, note 89. Other authorities hold that the allegation and proof of *scienter* is just as necessary in an action of tort for false warranty as in an action of tort for any other false statement. See *Pierce* v. *Carey*, 37 Wis. 232; Bell, J., in *Mahurin* v. *Harding*, 28 N. H. 128, 133, 134; *Caldbeck* v. *Simanton*, Vermont, A. D. 1909. 71 Atl. Rep. 881. — Ed.

[2] Arguments omitted. — Ed.

of his own knowledge, designedly intending to induce the plaintiff to suppose and believe, and thereby the plaintiff was induced to and did suppose and believe, that the farm contained at least one hundred and thirty acres of land, and relying thereupon, the plaintiff made the purchase; that the defendant knew that there was not one hundred and thirty acres, or he didn't know that there was that quantity; that in fact there was only one hundred and seventeen acres and a few rods in the farm; that the plaintiff had no knowledge of the quantity except from the defendant's representation.

The defendant gave evidence tending to show that he supposed there was one hundred and thirty acres and a little more in the farm, derived from what he had heard said, and from various deeds in his possession of various grantors and of various parcels, but that he did not know, and did not profess or represent to the plaintiff that he knew how many acres there were in fact; that he gave the plaintiff all the information and sources of information he had on the subject, neither making any false representation, nor fraudulent concealment, nor any undertaking as to the number of acres in the farm. There was no evidence or claim that the farm was sold by the acre; but it appeared that it was sold in lump, or as a farm entire.

The plaintiff requested the court to charge the jury: —

First, That under the declaration the plaintiff is entitled to recover if he proves a warranty of the number of acres in the farm, or if he proves a fraudulent representation of the number of acres.

Second, That the fraudulent representation may be proved either by evidence of false representations, known to the defendant to be false, and relied upon by the plaintiff, or by proof of an absolute representation of the number of acres, which representation was made with intent that the plaintiff should rely upon it, and was made upon professed knowledge, but without actual knowledge, and which was in fact false, but was relied upon by the plaintiff as true.

The Court complied with said requests only so far as is shown by the charge, and charged as follows: —

In order to entitle the plaintiff to recover he must satisfy the jury that the defendant knew the farm did not contain one hundred and thirty acres, or that he did not believe it contained one hundred and thirty acres; and that in order to induce the plaintiff to buy the farm he falsely represented it to contain one hundred and thirty acres; and that the plaintiff was by such false representation induced to make the purchase, believing it to contain that quantity.

If he honestly believed it contained one hundred and thirty acres, the plaintiff cannot recover, though the defendant was in error about it. Honest mistake is not fraud. Incorrect is not the same as false. You must find that he represented the quantity different from what he knew or believed to be true, with the fraudulent intent. Also, that the plaintiff was thus induced to make the purchase. That is, that the

plaintiff would not have made the purchase if the defendant had not represented it to be one hundred and thirty acres. Inquire as to these several points. Fraud is not presumed, but must be proved.

The jury returned a verdict for the defendant. The plaintiff excepted to the charge in the respects in which it failed to comply with, or was against said requests. In other respects the charge was satisfactory.

The declaration counted both upon a false warranty of the defendant in regard to the number of acres contained in the farm, and a warranty in regard to said quantity.

Norman Paul and *Washburn & Marsh*, for plaintiff.

W. C. French, for defendant.

The opinion of the Court was delivered by

STEELE, J. 1. The plaintiff cannot recover upon the ground of a parol warranty of the quantity of the land. If the quantity was warranted it should be provable by the deed. It is true that a deed of conveyance need not contain all the stipulations of the parties. For example, the agreements as to consideration and mode of payment need not be embraced in the deed, for the instrument purports to be the deed of but one of the parties. But it does purport to contain the covenants of the grantor with respect to the property conveyed. To add a new covenant by parol proof would be a palpable violation of the familiar rule that written contracts are not to be varied by oral testimony. Such a parol stipulation, it has been held, could not be proved in respect to an ordinary bill of sale of personal property.

Nor is the plaintiff entitled to recover in this action upon the ground of mistake. A mutual and material mistake, by which the purchaser was misled as to the quantity of land, would be a more appropriate ground for relief in a court of chancery than in a court of law.

If, then, the plaintiff was entitled to recover at all in this case, it was by reason of some fraud on the part of the defendant by which the bargain was induced.

2. The plaintiff complains of the ruling of the County Court upon the subject of fraud. It is conceded that the quantity of land was represented incorrectly. The Court properly told the jury that this, in itself, would not amount to fraud. To entitle the plaintiff to a recovery upon that ground, the defendant must have made some representation upon the subject that he did not believe to be true. The plaintiff claims, and his evidence tended to prove, that the defendant did make such a representation by stating the quantity of land as a matter within his own knowledge, when, in fact, as the defendant concedes, it was a matter upon which he had only a belief. We think it very clear that a party may be guilty of fraud by stating his belief as knowledge. Upon a statement of the defendant's mere belief, judgment, or information, the plaintiff might have regarded it prudent to procure a measurement of the land before completing his purchase. A statement, as of knowledge, if believed, would make a survey or measurement seem unnecessary. A representation of a fact, as of the party's own knowledge, if

it prove false, is, unless explained, inferred to be wilfully false and made with an intent to deceive, at least in respect to the knowledge which is professed. A sufficient explanation however sometimes arises from the nature of the subject itself, or from the situation of the parties being such that the statement of knowledge could only be understood as an expression of strong belief or opinion. But the quantity of land in a farm is a matter upon which accurate or approximately accurate knowledge is not at all impossible or unusual. If the defendant had only a belief or opinion as to the quantity of land, it was an imposition upon the plaintiff to pass off such belief as knowledge. So, too, if he made an absolute representation as to the quantity, which was understood and intended to be understood as a statement upon knowledge, it is precisely the same as if he had distinctly and in terms professed to have knowledge as to the fact. It is often said that a representation is not fraudulent if the party who makes it believes it to be true. But a party who is aware that he has only an opinion how a fact is, and represents that opinion as knowledge, does not believe his representation to be true. As is well said in a note to the report of the case of *Taylor* v. *Ashton*, 11 Mees. & Wels. 418, (Phila. Ed.), the belief of a party to be an excuse for a false representation must be "a belief in the representation as made. The *scienter* will therefore be sufficiently established by showing that the assertion was made as of the defendant's own knowledge, and not as mere matter of opinion, with regard to facts of which he was aware that he had no such knowledge." The same principle of law has been repeatedly recognized. *Hammatt* v. *Emerson*, 27 Maine, 308, 326; *Bennett* v. *Judson*, 21 N. Y. 238; *Stone* v. *Denny*, 4 Met. 151; *Hazard* v. *Irwin*, 18 Pick. 95.

In the case before us the plaintiff, under the charge of the Court, was denied the benefit of this rule of law, although there was evidence tending to show every necessary element of a fraud of the nature we have been considering. The plaintiff's request was refused, and the jury were instructed that the plaintiff could only recover in case they found "that the defendant represented the quantity of land different from what he knew or believed to be true." Under these instructions it would be immaterial whether he made the representation as a matter of knowledge or as a matter of opinion so long as he kept within his belief as to the quantity of land. In this we think there was error. The Court properly instructed the jury that the representation, to warrant a recovery, must have been relied on and have been an inducement to the purchase. The subsequent remark that the jury, to hold the defendant, must find that the plaintiff would not have made the purchase but for the representation, we regard as probably inadvertent.

What the plaintiff would have done but for the false representation is often a mere speculative inquiry, and is not the test of the plaintiff's right. If the false representations were material and relied upon, and were intended to operate and did operate as one of the inducements to

the trade, it is not necessary to inquire whether the plaintiff would or would not have made the purchase without this inducement.

The judgment of the County Court is reversed and the cause is remanded.[1]

HAYCRAFT *v.* CREASY.

1801. 2 *East*, 92.[2]

Action on the case for making false representations as to the credit of one E. F. Robertson. The declaration alleged that the representations were false, and made with intent to injure plaintiff; but did not allege that the defendant knew them to be false.

At the trial before Lord Kenyon, C. J., at the sittings at Guildhall, the transaction which led to the representations in question appeared in substance to be this: A Miss Robertson (the person named in the declaration), who had formerly been a teacher at a school, in which capacity the defendant had first become acquainted with her, having had children at that school, on a sudden, some little time before the transaction happened, gave herself out to the world as a person of considerable fortune, which had devolved upon her by her mother's death, and with still greater expectations from her grandfather and other relatives. Upon the strength of these assurances she contrived to obtain credit to a considerable amount from a number of persons, and settled herself in a large house at Blackheath, fitted up in an expensive manner, kept a carriage, exhibited a great show of plate, and other marks of affluence, talked of her relationship to persons of note; by means of all which she imposed on great numbers of persons, who believed her to be the character she had assumed, and visited her as such. Amongst other things she pretended to be the owner of a considerable estate in Scotland, from the rents of which she had been kept out for about forty years, but had then lately got into possession; and in support of these pretensions she exhibited supposed plans of the

[1] In *Leicher* v. *Keeney*, 98 Mo. App. 394, pp. 398-399, 405-406, the vendee alleged, in substance, that the vendor, during the negotiation, represented that the number of acres included in the description was 160; that, during the negotiation, vendee proposed to vendor that the land should be surveyed in order to determine the number of acres; that the vendor thereupon stated that he had surveyed the land, or caused it to be surveyed and measured, and that the land by such survey contained in fact 160 acres and that there was no use of any further survey; that the vendee, relying on these statements, was induced to accept a deed and pay the sum of $3500; whereas in fact the vendor had not had the land surveyed and knew that he had not; and the land described contained only 141.82 acres.

On the first trial of vendee's suit for deceit, the vendor (defendant) had judgment. The Court of Appeals reversed the judgment and remanded the case for a new trial. Upon a second trial the vendee (plaintiff) obtained judgment, which was affirmed in 110 Mo. App. 292. — Ed.

[2] Statement abridged. Arguments omitted. Only portions of the opinion are given. — Ed.

estate, with admeasurements of the woods, &c., and actually appointed a respectable man of business as her agent or steward, to receive the rents, &c., from whom she took bond to a large amount, as security for the faithful discharge of his functions. All these and other like appearances were proved to have been continually exhibited to the eyes of the defendant, who was a currier at Greenwich, near which Miss Robertson lived. And though some attempt was made by evidence to implicate him in the fraud that was going on, yet upon the result nothing of that sort was established against him; but it appeared that he himself had been duped by these appearances, and had actually lent her his acceptances to the amount of above £2000 upon the strength of them, for which he had not taken any security at the time the representations were made; though some months after, and before the final exposure of the imposition and the absconding of Miss Robertson, he had obtained of her a bond and warrant of attorney to secure his advances. The particular circumstances which led to the present action were these: About May or June, while Miss Robertson was fitting up her house at Blackheath, application was made on her behalf by the defendant to the plaintiff's son (who conducted the ironmongery business in his father's absence), the defendant stating that he had recommended Miss Robertson to come to the plaintiff for such articles as she might want in the way of his business. The plaintiff's son inquired as to her responsibility, she being an entire stranger to him and his father; to which the defendant answered, "your father may credit her with perfect safety; for I know of my own knowledge that she has been left a considerable fortune lately by her mother, and that she is in daily expectation of a much greater at the death of her grandfather, who has been bedridden a considerable time." The defendant afterwards came with Miss Robertson and her companion (also known to the defendant for many years before as the keeper of the same school), and they looked out and ordered articles to a large amount. The plaintiff's son swore at the trial that he dealt with them entirely on the defendant's information. Finding the order, however, to be so large, the son again asked the defendant if he were certain as to the representation he had made; who again answered with the same certainty, and never expressed any doubt. The son thereupon wrote to the plaintiff, and in consequence of the answer he received, applied to his uncle to see the defendant on the business. Upon this latter's application to the defendant for the same purpose, the defendant repeated his assertion that Miss Robertson was a person of great fortune and greater expectations, and was related to certain persons of rank whom he named; and added, "I can positively assure you of my own knowledge, that you may credit Miss Robertson to any amount with perfect safety." Various other assertions to the like effect were proved; but particularly on one occasion, after representations of this sort had been made to the plaintiff's brother, the latter said to the defendant, "I hope you do not inform this upon bare hearsay; but do

you know the fact yourself?" The defendant answered, "Friend Haycraft, I know that your brother may trust Miss Robertson with perfect safety, to any amount." The jury found a verdict for the plaintiff for £485.

A rule was obtained, calling on the plaintiff to show cause why the verdict should not be set aside, and a new trial had, on the ground that there was no fraud or deceit in the defendant making the representation in question, though he had incautiously averred that to be within his own knowledge, which in strictness he could not be said to know, but only had reasonable and probable cause to believe, and did in fact believe to be true at the time; and that without fraud the action was not maintainable though the representation turned out to be false.

Erskine, *Garrow*, *Gibbs*, and *Lawes*, showed cause against the rule.

The Attorney-General, *Dallas*, *Marryatt*, and *Comyn*, *contra*.

Lord Kenyon, C. J. . . . The plaintiff's brother puts the question expressly to the defendant, whether he stated this upon hearsay or of his own knowledge, drawing his attention therefore to the subject in the most particular manner; to which the defendant again replies, "I can positively assure you of my own knowledge that you may credit Miss Robertson to any amount with perfect safety." The question then is, Whether that representation were true or false? No doubt it was a gross falsity. She was not a person to be credited with safety, nor had he any knowledge that she was so; and it is a juggle to say that the words in common parlance do not import knowledge in the strict sense of it. They were so understood between the parties at the time, and the plaintiff has suffered a loss in consequence of it. . . . It is said that I imputed no fraud to this defendant at the trial. It is true that I used no hard words, because the case did not call for them. It was enough to state that the case rested on this, that the defendant affirmed that to be true within his own knowledge which he did not know to be true. This is fraudulent; not perhaps in that sense which fixes the stain of moral turpitude on the mind of the party, but falling within the notion of legal fraud, such as is presumed in all the cases within the statute of frauds. The fraud consists not in the defendant's saying that he believed the matter to be true, or that he had reason so to believe it, but in asserting positively his knowledge of that which he did not know. . . .

Grose, J. . . . Now I know not where to find any fraud in the transaction between these parties. I consider what was said by the defendant upon the several occasions, as no more than asserting his opinion on the credit of Miss Robertson; an opinion which he seems to have fairly entertained. It is true, that he asserted his own knowledge upon the subject; but consider what the subject-matter was of which that knowledge was predicated: it was concerning the credit of another, which is a matter of opinion. When he used those words, therefore, it is plain that he only meant to convey his strong belief of

her credit, founded upon the means he had had of forming such an opinion and belief. There is no reason for us to suppose that at the time of making those declarations he meant to tell a lie and mislead the plaintiff. He himself had trusted her before to a considerable amount. He had no reason to know otherwise than what he expressed; and had on the contrary reasonable grounds for asserting knowledge in the sense I understand him to have used it. . . . And taking the whole together, I think the evidence goes no further than his asserting that, to his firm belief and conviction, she was deserving of credit; and that the defendant was himself a dupe to appearances. . . .

LAWRENCE, J. . . . Stress has been laid on the defendant's assertion of his own knowledge of the matter; but persons in general are in the habit of speaking in this manner without understanding "knowledge" in the strict sense of the word in which a lawyer would use it. This observation will not only apply to ordinary men in common conversation, but also to persons of the best information. If any man should say that he knows there is no city larger than London, it must be understood that he is speaking only from information and belief upon such a subject, and not from actual mensuration. The same must be understood when one is speaking of his knowledge of the credit of another. . . .

[LE BLANC, J., delivered an opinion concurring with GROSE and LAWRENCE, JJ.] *Rule absolute.*

SECTION V.

Defendant's Intent that Plaintiff should act on the Representation.

FOSTER *v.* CHARLES.

1830. 7 *Bingham*, 105.[1]

CASE for deceit; the declaration alleging that certain false representations were made by the defendant to the plaintiffs, merchants in London, in order to induce them to engage one Jacque as their agent at Manchester.

Plea, the general issue.

At the trial before Tindal, C. J., London sittings after Michaelmas term, it appeared that in November or December, 1824, the defendant, a soap manufacturer, called on the plaintiffs, wholesale tea dealers, with whom he was on terms of intimacy, and after asking them if they did business at Manchester, said "he had a young friend for whom he was anxious to procure a commission in the tea trade at Manchester; a nice young man, who had an excellent connection there, and would be a great acquisition to any person who wanted to do business there; the defendant being on such terms with the plaintiffs, he had offered it to them before he proposed it to Smith and Co., — a respectable house in the same line of business; that Smith and Co. would jump at the offer; that his friend was so excellent a young man, that he would rather trust him without security than most men with; that this young man had been doing business at Manchester for a London tea house, who could no longer execute his extensive orders; that he had an uncle at Manchester, a clergyman of the Scotch Church, who would afford him great facilities in the way of business, and knew all the Scotch travellers in the trade; that defendant would like him to sell soap for defendant and his partner, but feared his other connections would not allow him time."

The plaintiffs said they had an objection to giving commissions; but the very strong recommendation defendant had given of his friend would induce them to think of it.

Accordingly, in the beginning of 1825, the plaintiffs employed James Jacque, the defendant's young friend, to do business for them on commission at Manchester. But by the middle of 1827, after repeatedly sending incorrect statements of the amount of his receipts on their behalf, he contrived to be a defaulter to them to the extent of £900 and upwards, and to involve them in bad debts to a much greater amount.

He then took the benefit of the insolvent debtors' act.

[1] Part of the statement is an abridgment of the report in 6 Bingham, 396. — ED.

Instead of having been employed in the Manchester commission tea trade in the year 1824, as the defendant had stated to the plaintiffs, it appeared that he had, at the recommendation of the defendant, been taken into partnership without any capital by Mr. R. C. Stewart, a warehouseman in London, in July, 1823; but great losses having been incurred in that concern, aggravated by a robbery to some amount, Mr. Stewart closed the concern and dissolved the partnership in October, 1824.

Jacque was then indebted to Stewart in the sum of £800, which he undertook by deed, dated November 13, 1824, to pay by instalments, in two, three, and four years; but nothing was ever paid.

All this was known to the defendant, who had acted throughout for Jacque, and had negotiated the terms of the dissolution of partnership.

Letters were also put in, written by the defendant to Jacque, after the exposure of the Manchester transactions, in which the defendant exhorted Jacque to write various falsehoods to the plaintiffs with a view to the exculpation of the defendant, and to conceal from the plaintiffs his knowledge of some of the transactions at Manchester.

When the defendant was first applied to on the subject by the plaintiffs, he expressed his regret that his house should have been the means of introducing an unworthy agent to the plaintiffs; but that as they had been instrumental in bringing the loss on the plaintiffs, he would see his partner on the subject, and see what could be done towards relieving them from it. No step of that kind having been taken, the present action was commenced.

Tindal, C. J., told the jury to consider whether the representation complained of by the plaintiffs had ever been made, and if made, whether it was false within the knowledge of the defendant; for unless it were false within his knowledge, the action did not lie.

The jury returned a verdict for the defendant, which was set aside by the Court. [6 Bingham, 396.]

Upon a new trial, Tindal, C. J., told the jury that if the defendant made representations concerning Jacque, the tendency of which was to occasion loss to the plaintiff, knowing such representations to be false, and intending thereby to benefit himself, he was guilty of fraud in the common acceptation of the term; if he made such representations, knowing them to be false, without proposing thereby any advantage to himself, but proposing, perhaps, to benefit a third person, he was guilty of fraud in the legal acceptation of the term, and responsible to the plaintiff for any injury resulting from such representations.

The jury thereupon found for the plaintiff, damages £800; but added: "We consider there was no actual fraud on the part of the defendant, and that he had no fraudulent intention, although what he has done constituted a fraud in the legal acceptation of the term."

Jones, Serjt., now contended that this amounted to a verdict for the defendant; and therefore moved that the verdict might be entered for him, instead of the plaintiff.

He urged, at some length, nearly the same arguments as he had advanced on a former occasion, and adverted to the same authorities (see 6 Bing. 402); contending that this action was substituted for the ancient writ of deceit; that the gist of the action was a fraudulent intent on the part of the defendant to injure the plaintiff by deceiving him; that a defendant was not responsible for the consequences of a statement, merely because he knew it to be false; he was not responsible for the consequences of a bare lie; in order to render him responsible, it ought to be shown that he intended to defraud the plaintiff of something by the deceit he had practised. That if a party were responsible for the consequences of a lie told without any intention to defraud the hearer of something, no line could be drawn, and parties might be called on to answer for those excusable untruths, which were sometimes told for the purpose of avoiding a greater mischief.

TINDAL, C. J. No sufficient ground has been laid to induce us to disturb the verdict which has been found for the plaintiff. The application arises on a misconception of what the jury have found. They first deliver a verdict for the plaintiff, with damages, and then add, that in point of fact they consider the defendant had no fraudulent intention, although he had been guilty of fraud in the legal acceptation of the term.

Their attention had been drawn by me to two classes of motives possible on the part of the defendant; first, a desire to benefit himself by making a statement which he knew to be false; secondly, a desire to benefit some third person; and I stated that, although there might be no intention on his part to obtain an advantage for himself, it would still be a fraud, for which he was responsible in law, if he made representations productive of loss to another, knowing such representations to be false.

The jury in finding that he had no intention to defraud mean only that he was not actuated by the baser motive of obtaining an advantage for himself, but that he was guilty of fraud in law by stating that which he knew to be false, and which was the cause of loss to the plaintiff.

The question, therefore, is, whether, if a party makes representations which he knows to be false, and occasions injury thereby, he is not liable for the consequences of his falsehood. It would be most dangerous to hold that he is not.

The confusion seems to have arisen from not distinguishing between what is fraud in law and the motives for actual fraud. It is fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motive from which the representations proceeded may not have been bad; the person who makes such representations is responsible for the consequences; and the verdict, therefore, in this case ought not to be disturbed.

PARK, J. I am of the same opinion. In what fell from this Court in the case of *Tapp* v. *Lee*, and upon the former decision of the present

case, the doctrine has been laid down most accurately. It would be unfair to take the expressions of the jury, without connecting them with what the Chief-Justice had just presented for their consideration. It is clear that the jury meant to draw the distinction between the sordid motive of personal advantage and the legal fraud which might be committed by a representation false within the knowledge of the speaker, although made without any view to his own advantage. For such a representation the defendant is responsible if mischief ensues, whatever may have been his motive; and as to its being necessary to prove the motive by which he was actuated: when the case was last before the Court, Tindal, C. J., said, "I am not aware of any authority for such a position, nor that it can be material what the motive was; the law will infer an improper motive, if what the defendant says is false within his own knowledge, and is the occasion of damage to the plaintiff."

Here the defendant said, "That his friend was so excellent a young man, that he would rather trust him without security than most men with;" when he knew the contrary to be the fact, he was guilty of a fraud in law in making such a representation; and fraud in law is sufficient to support this action.

GASELEE, J. When this verdict is taken in connection with the direction of the Chief-Justice, there is an end to all doubt as to the meaning of the jury, and the finding is a perfect finding. What the jury meant by actual fraud was a sordid regard to self-interest; but the legal fraud, which is sufficient to sustain the action, was complete when the intention to mislead was followed by actual injury.

BOSANQUET, J. There seems to me to be no reason for disturbing this verdict. In the course of the trial, it is probable that improper motives had been ascribed to the defendant. The Chief-Justice, therefore, stated to the jury, and stated correctly, that motives of that description in the defendant were not essential to the plaintiff's action. If a person tells a falsehood, the natural and obvious consequence of which, if acted on, is injury to another, that is fraud in law. Coupling that with what the Chief-Justice addressed to the jury, their verdict only means that the defendant did not propose to benefit himself, perhaps intended to benefit another; but that what he said, intending to benefit another, was false within his own knowledge, injurious to the party who received the communication, and, consequently, a fraud in the legal acceptation of the term. *Rule refused.*

POLHILL *v.* WALTER.

1832. 3 *Barnewall & Adolphus*, 114.[1]

Lord Tenterden, C. J. In this case, in which the defendant obtained a verdict on the trial before me at the sittings after Hilary Term, a rule *nisi* was obtained to enter a verdict for the plaintiff, and cause was shown during the last term. The declaration contained two counts: the first stated, that a foreign bill of exchange was drawn on a person of the name of Hancorne, and that the defendant falsely, fraudulently, and deceitfully did represent and pretend that he was duly authorized to accept the bill by the procuration, and on behalf of Hancorne, and did falsely and fraudulently pretend to accept the same by the procuration of Hancorne. It then proceeded to allege several indorsements of the bill, and that the plaintiff, relying on the pretended acceptance, and believing that the defendant had authority from Hancorne to accept, received the bill from the last indorsee in discharge of a debt; that the bill was dishonored, and that the plaintiff brought an unsuccessful action against Hancorne. The second count contained a similar statement of the false representation by the defendant, and that he accepted the bill in writing under pretence of the procuration from Hancorne; and then proceeded to describe the indorsements to the plaintiff, and the dishonor of the bill, and alleged, that thereupon it became and was the duty of the defendant to pay the bill as the acceptor thereof, but that he had not done so.

On the trial it appeared, that when the bill was presented for acceptance by a person named Armfield, who was one of the payees of the bill, Hancorne was absent; and that the defendant, who lived in the same house with him, was induced to write on the bill an acceptance as by the procuration of Hancorne, Armfield assuring him that the bill was perfectly regular, and the defendant fully believing that the acceptance would be sanctioned, and the bill paid at maturity, by the drawee. It was afterwards passed into the plaintiff's hands, and being dishonored when due, an action was brought against Hancorne; the defendant was called as a witness on the trial of that action, and he negativing any authority from Hancorne, the plaintiff was nonsuited. I left to the jury the question of deceit and fraud in the defendant, as a question of fact on the evidence, and the jury having negatived all fraud, the defendant had a verdict, liberty being reserved to the plaintiff to move to enter a verdict, if the Court should think the action maintainable notwithstanding that finding.

On the argument, two points were made by the plaintiff's counsel. It was contended, in the first place, that although the defendant was not guilty of any fraud or deceit, he might be made liable as acceptor

[1] Statement of facts, and arguments of counsel, omitted. — Ed.

of the bill; that the second count was applicable to that view of the case; and that, after rejecting the allegations of fraud and falsehood in that count, it contained a sufficient statement of a cause of action against him, as acceptor. But we are clearly of opinion that the defendant cannot be made responsible in that character. It is enough to say that no one can be liable as acceptor but the person to whom the bill is addressed, unless he be an acceptor for honor, which the defendant certainly was not.

This distinguishes the present case from that of a pretended agent making a promissory note (referred to in Mr. Roscoe's Digest of the Law of Bills of Exchange, note 9, p. 47), or purchasing goods in the name of a supposed principal. And, indeed, it may well be doubted if the defendant, by writing this acceptance, entered into any contract or warranty at all, that he had authority to do so; and if he did, it would be an insuperable objection to an action as on a contract by this plaintiff, that at all events there was no contract with, or warranty to, him.

It was in the next place contended that the allegation of falsehood and fraud in the first count was supported by the evidence; and that, in order to maintain this species of action, it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff; it was said to be enough if a representation is made which the party making it knows to be untrue, and which is intended by him, or which, from the mode in which it is made, is calculated to induce another to act on the faith of it, in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature was contended to be, in the legal sense of the word, a fraud; and for this position was cited the case of *Foster* v. *Charles*, 6 Bing. 396; 7 Bing. 105, which was twice under the consideration of the Court of Common Pleas, and to which may be added the recent case of *Corbet* v. *Brown*, 8 Bing. 33. The principle of these cases appears to us to be well founded, and to apply to the present.

It is true that there the representation was made immediately to the plaintiff, and was intended by the defendant to induce the plaintiff to do the act which caused him damage. Here, the representation is made to all to whom the bill may be offered in the course of circulation, and is, in fact, intended to be made to all, and the plaintiff is one of those; and the defendant must be taken to have intended, that all such persons should give credit to the acceptance, and thereby act upon the faith of that representation, because that, in the ordinary course of business, is its natural and necessary result.

If, then, the defendant, when he wrote the acceptance, and thereby, in substance, represented that he had authority from the drawee to make it, knew that he had no such authority (and upon the evidence there can be no doubt that he did), the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence.

If the defendant had had good reason to believe his representation to be true, as, for instance, if he had acted upon a power of attorney which he supposed to be genuine, but which was, in fact, a forgery, he would have incurred no liability, for he would have made no statement which he knew to be false: a case very different from the present, in which it is clear that he stated what he knew to be untrue, though with no corrupt motive.

It is of the greatest importance in all transactions that the truth should be strictly adhered to. In the present case, the defendant no doubt believed that the acceptance would be ratified, and the bill paid when due, and if he had done no more than to make a statement of that belief, according to the strict truth, by a memorandum appended to the bill, he would have been blameless. But then the bill would never have circulated as an accepted bill, and it was only in consequence of the false statement of the defendant that he actually had authority to accept, that the bill gained its credit, and the plaintiff sustained a loss. For these reasons we are of opinion that the rule should be made absolute to enter a verdict for the plaintiff. *Rule absolute.*

BUTTERFIELD *v.* BARBER.

1897. 20 *Rhode Island*, 99.

Case for deceitful representations by a debtor to his creditor, the plaintiff having subsequently purchased the claim from the latter in the form of a promissory note. Heard on defendant's petition for new trial.

Per Curiam. Assuming that the representations testified to by the plaintiff were made by the defendant, the testimony shows that they were made for the purpose of being communicated to Murphy, to procure an extension of time for the payment of his claim against the defendant. At the time they were made the defendant had no expectation that the note, which was subsequently made, was to be taken by the plaintiff, who, in the meantime, had purchased the claim from Murphy. We do not think that in these circumstances the plaintiff had the right to rely on the representations, if they were made, because they were not made with the intention of inducing his action, and consequently that he has no ground to maintain an action for deceit.

Case remitted to the Common Pleas Division, with direction to enter judgment for the defendant for costs.

Patrick H. Mulholland, for plaintiff.

George A. Littlefield, for defendant.

SECTION VI.

Plaintiff acting in Reliance on the Representation, and suffering Damage thereby. Measure of Damage.

NYE *v.* MERRIAM.

1862. 35 *Vermont*, 438.[1]

Case for fraud, in cheating in weighing a quantity of butter sold by plaintiff to defendant.

Plaintiff's evidence tended to prove that he sold defendant eleven tubs of butter at a specified price per pound; that the butter was delivered by plaintiff's father in plaintiff's absence; that defendant weighed the butter in presence of the father, and cheated in the weighing, marking a false weight on each tub and also on a slip of paper given to the father.

Plaintiff subsequently met the defendant at Lebanon, N. H., and called upon him to pay the balance due for the butter. In relation to what took place between the plaintiff and the defendant on this occasion, the plaintiff testified as follows: —

"The defendant felt bad because he could not pay me. I said if he could not pay me he must give me his note, as I had nothing to show. He asked how much it was. I told him I did not know, but supposed he could tell. He said he could not, that his papers were in his valise or trunk. I said I supposed it was about sixty dollars; he thought it was fifty-five or sixty dollars. I said I had been at considerable trouble hunting after him, and would call it sixty dollars. He assented, and gave me his note for sixty dollars, and I came home. I had lost the paper that my father gave me, and did not know what the figures were. There was not a word said between us about fraud in the weight, and no allusion to it whatever."

Defendant's evidence tended to prove (among other things) that the note was given to cover and settle not only for the balance due for the butter, but also for plaintiff's claim for being cheated by the defendant in the weight.

The Court charged the jury that if the plaintiff satisfied them that the defendant purposely cheated in weighing the butter, still, if the plaintiff's claim for such fraud was mutually settled and adjusted by the parties, and included in said note, it would be a defence to the action, but that if the note was given merely in settlement of the balance due to the plaintiff for his butter, at its reported weight by the defendant, and with no reference whatever to the plaintiff's having been

[1] Statement abridged. — Ed.

cheated by the defendant in the weight, then the plaintiff's right of action for such fraud was not thereby barred, even though the note given was large enough to cover the whole of the butter received by the defendant at the contract price; that if t e facts in reference to the settlement and giving of the note were just as stated by the plaintiff, they would not amount to a settlement of the fraud in the weight, if such existed.

Defendant excepted to the charge. *Verdict for plaintiff.*

W. W. Grout and *Benj. H. Steele*, for defendant.

J. S. Sartle and *T. P. Redfield*, for plaintiff.

ALDIS, J. The jury have found that the defendant attempted to cheat the plaintiff in the weight of his butter; that he reported the weight to the plaintiff's father, and marked the tubs at from twenty to thirty pounds less than the true weight. The plaintiff was not present when the butter was weighed, and therefore had to rely on the paper the defendant gave his father containing the figures of the weight.

I. If the plaintiff settled with the defendant for the butter upon the basis of the weight as reported by the defendant, and afterwards discovered the fraud, he would, it is admitted, be entitled to recover for the fraud.

II. But the defendant claims that the case, standing on the plaintiff's testimony, shows that the plaintiff has suffered no damage; that although the defendant may have attempted a fraud, yet in fact he has not accomplished his attempt; but on the contrary, has given his note to the plaintiff on settlement for more than the value of the butter at its true weight and contract price.

To sustain this action there must be both fraud and damage. A naked lie that causes no injury to another is not actionable. The lie must be relied upon, and must occasion damage.

The defendant claims, first, that the lie was not relied upon; and, secondly, that it did no damage, according to the plaintiff's own testimony; and that this view of the case was not presented to the jury. To determine this point we must consider the plaintiff's testimony, and the charge of the Court in regard to it.

The plaintiff, hearing that the defendant was about to go to California, and not to return to pay for the butter, went in search of him, and after going to New York and Boston, found the defendant at Lebanon, New Hampshire.

He called on the defendant for payment of the balance due for the butter. The defendant said he had no money. The plaintiff replied: "If you cannot pay me you must give me your note." "He, the defendant, asked how much it was. I told him I did not know, but supposed he could tell. He said that he could not, that his papers were in his valise. I said I supposed it was about sixty dollars. He thought it was fifty-five or sixty dollars."

It will be noticed that thus far nothing has been asked for by the plaintiff, or spoken of by either, but "payment of the balance due for

the butter;" and that what that balance was, was what neither could exactly tell, — the plaintiff supposing it "about sixty dollars," and the defendant "fifty-five or sixty dollars." The plaintiff then proceeds: "I said I had been at considerable trouble hunting after him, and would call it sixty dollars. He assented and gave me his note for sixty dollars." It is admitted that this note was large enough to cover the full amount of the butter at the contract price.

The plaintiff further said that he had lost the paper that his father gave him, and did not know what the figures were.

Now, upon this evidence it is clear that the defendant might justly have urged upon the jury, first, that the note was given solely for the balance due for the butter; that the remark as to his trouble in hunting after the defendant was not intended by him, or understood by the defendant, as making those expenses or that trouble a part of the consideration of the note, but only as entitling him equitably or morally to have the defendant's doubt whether the balance was fifty-five or sixty dollars solved in the plaintiff's favor. If given solely for the balance due for the butter, and it covered the whole balance according to true weight and contract price, we are at a loss to see what damage occasioned by the original false statement of the defendant has accrued to the plaintiff. The plaintiff does not appear to have incurred any expense or trouble on account of the falsehood, or to have lost anything by it. He did not go in search of the defendant on account of it. The attempt to cheat was not consummated by payment or settlement at the lower weight.

Had he known all the facts as to the attempt to cheat, he could not have asked for more than the sixty dollars as the balance due him for the butter. Nor does it appear that the falsehood had worked him any injury for which he could have asked for further compensation.

Secondly, the defendant might also have justly insisted that to sustain this action the plaintiff must show that he relied upon the false statement in making the settlement.

The testimony of the plaintiff might fairly be claimed by the defendant as tending to show that the plaintiff could not recollect what the statement originally made by the defendant as to the weight was; that the plaintiff had lost the paper which the defendant gave to his father, and had forgotten its contents; that the defendant could not tell what the weight was, and did not renew or insist on the original falsehood; and that both parties acted on their own knowledge and judgment as to the weight, uninfluenced by the false statement of the weight as originally made.

If the plaintiff did not recollect the false statement, — did not know and could not tell what the balance due for the butter was, according to the original falsehood, nor what the figures were which indicated the false weight, but claimed a balance sufficient to cover the whole and true weight, and received it on settlement, we are at a loss to see how he can claim to have been defrauded.

The Court in the charge did not present the case to the jury in these two aspects, but seemed to hold that the original falsehood necessarily included damage, and gave a right of action for fraud in weighing, and that, unless such right to sue was discharged in the settlement, it remained in full vigor, and that the plaintiff's testimony did not show it settled. For the reasons above given we think the charge erroneous, and that the judgment must be reversed.

[Omitting opinion on other points.] *Judgment reversed.*

ALDEN *v.* WRIGHT. Minority, but best rule.

1891. 47 *Minnesota*, 225.[1]

Action for deceit in the exchange of real property for shares of corporate stock. Plaintiff alleged fraudulent representations on the part of defendants as to the value of the shares, whereby he was induced to make the exchange. Trial. Verdict for defendants. Plaintiff appealed from an order denying a new trial.

Benton & Roberts, and *Rome G. Brown*, for appellant.

D. A. Secombe and *Weed Munro*, for respondents.

Collins, J. . . .

2. At defendants' request the court charged the jury, in substance, that they must find for defendants, unless it appeared by a preponderance of testimony that the property conveyed by plaintiff in exchange for the shares of stock was worth more than the latter; and to this plaintiff excepted, on the ground that it prevented the jury from returning a verdict in his favor for nominal damages; that, even if the jury should fail to find that the property conveyed by plaintiff was of greater value than the shares of stock transferred to him, — passing on all other questions in his favor, — they might award him nominal damages at least; and that the possibility of such an award was excluded by the charge. But, at plaintiff's request, the jury was instructed that, if they found for him, the amount he would be entitled to recover would be the amount of the difference between the actual value of the property which he conveyed and the actual value of the stock received by him. The rule as to the measure of damages in the case was stated in better form in plaintiff's than in defendants' request, but one was, in effect, a repetition of the other. The rule was correctly stated in each, and the same proposition of law was elsewhere in the charge laid down by the court in very concise and proper, but different, language. The essential elements which constitute a cause of action for deceit are well stated in *Busterud* v. *Farrington*, 36 Minn. 320 (31 N. W. Rep. 360), and one is that the party induced to act has been damaged. He must have acted on the

[1] Statement abridged. Part of opinion omitted.— Ed.

faith of the false representations *to his damage.* A party cannot sustain an action of this character where no harm has come to him. Deceit and injury must concur, — *Doran* v. *Eaton,* 40 Minn. 35 (41 N. W. Rep. 244); — or, as it has frequently been put by the courts, fraud without damage or damage without fraud will not sustain the action for deceit. *Taylor* v. *Guest,* 58 N. Y. 262; *Nye* v. *Merriam,* 35 Vt. 438; *Freeman* v. *McDaniel,* 23 Ga. 354; *Byard* v. *Holmes,* 34 N. J. Law, 296; 3 Suth. Dam. 594; Cooley, Torts, 474; Bailey, Onus Probandi, 770. If, therefore, the shares of stock were worth what plaintiff gave for them, were of equal value with the property exchanged, the plaintiff was not damaged, and was not entitled to recover; for the proper measure of damages was the difference in value between the shares of stock and the property conveyed by plaintiff for them. *Redding* v. *Godwin,* 44 Minn. 355 (46 N. W. Rep. 563), and cases cited. The plaintiff, under such a rule, would not be permitted to recover nominal damages even without proof of loss or injury, and there is nothing said in *Potter* v. *Mellen,* 36 Minn. 122 (30 N. W. Rep. 438), as counsel has contended, indicating a contrary view. Damage is of the essence of the action of deceit; an essential element to the right of action, and not merely a consequence flowing from it.

Order affirmed.[1]

FOTTLER *v.* MOSELEY.

1901. 179 *Massachusetts,* 295.[2]

TORT for deceit, alleging that, relying upon the false and fraudulent representations of the defendant, a broker, that certain sales of the stock of the Franklin Park Land Improvement Company in the Boston Stock Exchange from January 1 to March 27, 1893, were genuine transactions, the plaintiff revoked an order for the sale of certain shares of that stock held for him by the defendant, whereby the plaintiff suffered loss. Writ dated February 17, 1896.

[1] In *Allaire* v. *Whitney,* 1 Hill, New York, 484, p. 487, COWEN, J., says that actual damage is not necessary to an action for fraud: and see also INGRAHAM, J., in *Isman* v. *Loring,* New York App. Div. A. D. 1909, 115 New York Supplement, 933, p. 935. The same doctrine is stated in *Northrop* v. *Hill,* 57 New York, 351; and in *Van Velsor* v. *Seaberger,* 35 Illinois App. 598; but neither case was one of merely nominal damages. *Leadbetter* v. *Morris,* 3 Jones, Law, North Carolina, 543, sustains the view of COWEN, J. The doctrine of COWEN, J., in *Allaire* v. *Whitney* is also cited approvingly in 1 Sedgwick on Damages, 8th ed., s. 101, and in 1 Sutherland on Damages, 3d ed., s. 10.

But the great weight of authority is against this doctrine, and accords with the view taken by the Minnesota court in the above case of *Alden* v. *Wright:* — viz. that an action of deceit cannot be maintained in the absence of actual damage. See Pollock on Torts, 6th ed., 183; Pollock, Law of Fraud in British India, 22, 23; 1 Jaggard on Torts, 600, 601; Pigott on Torts, 270, 271; 20 Cyclopedia of Law and Procedure, p. 42; 14 Am. & Eng. Encycl. Law, 2d ed., pp. 137, 138; SHELDON, J., in *Brackett* v. *Perry,* Massachusetts, A. D. 1909, 87 Northeastern Reporter, 903. — ED.

[2] Statement abridged. — ED.

At the trial in the Superior Court, Hopkins, J., at the close of the evidence, directed the jury to return a verdict for the defendant. The verdict was returned as directed; and the plaintiff alleged exceptions. The findings warranted by the evidence are stated in the opinion of the court.

. . . . . .

R. W. Nason, for plaintiff.

B. L. M. Tower, for defendant.

HAMMOND, J. The parties to this action testified in flat contradiction of each other on many of the material issues, but the evidence in behalf of the plaintiff would warrant a finding by the jury, that on March 25, 1893, the plaintiff, being then the owner of certain shares of stock in the Franklin Park Land and Improvement Company, gave an order to the defendant, a broker who was carrying the stock for him on a margin, to sell it at a price not less than $28.50 per share; that on March 27 the defendant, for the purpose of inducing the plaintiff to withdraw the order and refrain from selling, represented to the plaintiff that the sales which had been made of said stock in the market had all been made in good faith and had been "actual true sales throughout"; that these statements were made as of the personal knowledge of the defendant, and that the plaintiff, believing them to be true and relying upon them, was thereby induced to and did cancel his oral order to the defendant to sell, and did refrain from selling; and that the statements were not true as to some of the sales in the open market, of which the last was in December, 1892, and that the defendant knew it at the time he made the representations. The evidence would warrant a further finding that in continuous reliance upon such representations the plaintiff kept his stock, when he otherwise would have sold it, until the following July, when its market value depreciated and he thereby suffered loss. The defendant, protesting that he made no such representation and that the jury would not be justified in finding that he had, says that even upon such a finding the plaintiff would have no case. He contends that the representation was not material, that a false representation to be material must not only induce action but must be adequate to induce it by offering a motive sufficient to influence the conduct of a man of average intelligence and prudence, and that in this case the representation complained of, so far as it was false, was not adequate to induce action because the fictitious sales were so few and distant in time, and that therefore it was not material.

It may be assumed that the plaintiff desired to handle his stock in the manner most advantageous to himself, and that the question whether he would withdraw his order to sell was dependent, somewhat, at least, upon his view of the present or future market value of the stock; and upon that question a man of ordinary intelligence and prudence would consider whether the reported sales in the market were "true sales throughout" or were fictitious, and what was the extent of each. It is true that a corporation may be of so long standing and of

such a nature, and the number of the shares so great and the daily sales of the stock in the open market so many and heavy, that the knowledge that a certain percentage of the sales reported are not actual business transactions would have no effect upon the conduct of an ordinary man. On the other hand a corporation may be so small and of such a nature and have so slight a hold upon the public, and the number of its shares may be so small and the buyers so few, that the question whether certain reported sales are fictitious may have a very important bearing upon the action of such a man. Upon the evidence in this case, we cannot say, as matter of law, that the representation so far as false was not material. This question is for the jury, who are to consider it in the light of the nature of the corporation and its standing in the market, and of other matters, including such as those of which we have spoken.

It is further urged by the defendant that one of the fundamental principles in a suit like this is that the representation should have been acted upon by the complaining party and to his injury; that at most the plaintiff simply refrained from action, and that "refraining from action is not acting upon representation" within the meaning of the rule; and further that it is not shown that the damages, if any, suffered by the plaintiff are the direct result of the deceit.

Fraud is sometimes defined as the "deception practised in order to induce another to part with property or to surrender some legal right," Cooley, Torts (2d ed.), 555, and sometimes as the deception which leads "a man into damage by wilfully or recklessly causing him to believe and act on a falsehood." Pollock, Torts (Webb's ed.), 348, 349. The second definition seems to be more comprehensive than the first (see for instance *Barley* v. *Walford*, 9 Q. B. 197, and *Butler* v. *Watkins*, 13 Wall. 456), and while the authorities establishing what is a cause of action for deceit are to a large extent convertible with those which define the right to rescind a contract for fraud or misrepresentation and the two classes of cases are generally cited without any express discrimination, still discrimination is sometimes needful in the comparison of the two classes of cases. Pollock, Torts (Webb's ed.), 352.

It is true that it must appear that the fraud should have been acted upon. It is a little difficult to see precisely what is meant by the contention that "refraining from action is not acting upon representation." If by refraining from action it is meant simply that the person defrauded makes no change but goes on as he has been going and would go whether the fraud had been committed or not, then the proposition is doubtless true. Such a person has been in no way influenced, nor has his conduct been in any way changed by the fraud. He has not acted in reliance upon it. If, however, it is meant to include the case where the person defrauded does not do what he had intended and started to do and would have done save for the fraud practised upon him, the proposition cannot be true. So far as respects the owner of property, his change of conduct between keeping the property on the

one hand and selling it on the other, is equally great, whether the first intended action be to keep or to sell; and if by reason of fraud practised upon him the plaintiff was induced to recall his order to sell, and, being continuously under the influence of this fraud, kept his stock when, save for such fraud, he would have sold it, then with reference to this property he acted upon the representation within the meaning of the rule as applicable to cases like this. *Barley* v. *Walford*, 9 Q. B. 197; *Butler* v. *Watkins*, 13 Wall. 456.

The cases of *Lamb* v. *Stone*, 11 Pick. 527; *Wellington* v. *Small*, 3 Cush. 145; and *Bradley* v. *Fuller*, 118 Mass. 239, upon which the defendant relies, are not authorities for the proposition that "refraining from action is not acting upon representation."

As to whether the loss suffered by the plaintiff is legally attributable to the fraud, much can be said in favor of the defendant, and a verdict in his favor on this as well as on other material points might be the one most reasonably to be expected upon the evidence, especially when it is considered that during the years 1892 and 1893 the plaintiff was a director in the company; but we cannot decide the question as a matter of law. If the fraud operated on the plaintiff's mind continuously, up to the time of the depreciation of the stock in June, 1893, so that he kept his stock when otherwise he would have sold it, and such was the direct, natural and intended result, then we think the causal relation between the fraud and the loss is sufficiently made out. See *Reeve* v. *Dennett*, 145 Mass. 23, 29.

Exceptions sustained.

MATTHEWS *v.* BLISS.

1839. 22 *Pickering*, 48.[1]

Action on the case, alleging that plaintiff was part owner of a vessel; that he had given to one Chapin a power in writing, authorizing Chapin to sell plaintiff's share of the vessel for a fair price; and that defendants by false and fraudulent representations induced Chapin to sell and convey plaintiff's share for much less than its true value.

Plaintiff introduced evidence tending to prove the foregoing allegations.

The Court instructed the jury, that, in order to maintain this action, they must be satisfied that the defendants had made the false representation set forth in the declaration, and that the sale was effected by means of such representation; that it was not necessary that it should be the sole and only motive inducing the sale, but it must have been a predominant one. *Verdict for defendants.*

[1] Only so much of the case is given as relates to one point. The arguments are omitted. — Ed.

H. H. Fuller, and *F. Smith*, for plaintiff.

Choate, *Simmons*, and *Gay*, for defendants.

SHAW, C. J. [Omitting part of opinion.] The judge further instructed the jury, that in order to maintain this action, they must be satisfied that the defendants had made the false representation, and that the sale was produced by means of it; that it was not necessary that it should be the sole and only motive inducing the sale, but it must have been a predominant one. In this particular, the Court are of opinion, that the direction, as it may have been and probably was understood by the jury, was not strictly correct; though it may have been so qualified and illustrated as to prevent the jury from being misled by it.

The term "predominant," in its natural and ordinary signification, is understood to be something greater or superior in power and influence to others, with which it is connected or compared. So understood, a predominant motive, when several motives may have operated, is one of greater force and effect, in producing the given result, than any other motive. But the Court are of opinion, that if the false and fraudulent representation was a motive at all, inducing to the act, if it was one of several motives, acting together, and by their combined force producing the result, it should have been left to the jury so to find it. If the false suggestion had no influence, if the plaintiff's agent would have done the same thing and made the sale if such representation had not been made, then it was not a motive to the act, and the plaintiff's agent was not induced to sell by means of it. On the whole, considering that the ordinary and natural meaning of the term "predominant," when applied to one among several motives, is such as has been stated, that the jury may have so understood it, and if they did so understand it, they may have come to a verdict not warranted by law, upon the evidence before them, the Court are of opinion, that the verdict ought to be set aside, and a new trial granted.

[Omitting remainder of opinion.] *New trial granted.*

FREEMAN v. VENNER.

1876. 120 *Massachusetts*, 424.[1]

ACTION of tort. Writ dated Dec. 22, 1873. Plaintiff held the negotiable promissory note of J. W. and J. H. Cox, dated July 16, 1873, payable to plaintiff or order in two years from date; and he also held a mortgage conditioned to secure the note. In consideration of land to be conveyed to him by the defendant, plaintiff agreed to assign to defendant the mortgage and note; but he did not agree to make an unrestricted indorsement of the note, and the defendant was not entitled to have the personal liability of the plaintiff as

[1] Statement abridged. Part of opinion omitted. — ED.

indorser of the note. Plaintiff, through ignorance of the law, and by reason of the false and fraudulent representations of defendant, on Dec. 1, 1873, indorsed the note in blank without any qualification. As soon as the plaintiff became aware of the obligation he had thus assumed, and before defendant had negotiated the note or altered his position in any way, plaintiff demanded to be allowed to qualify his indorsement so that it should merely transfer the title according to the agreement. Defendant refused to allow this. Thereupon plaintiff forbade defendant to negotiate the note; but defendant, notwithstanding, negotiated the note before maturity to one Tenney, a *bona fide* holder for value.

Upon a trial by a judge, without a jury, the foregoing facts were found, substantially as alleged in the declaration.

It also appeared, that, before commencing his action, or at any time before said trial, the plaintiff had made no payment on account or by reason of the indorsement; that, before the commencement of this action and before the maturity of the note, the makers thereof had become bankrupts; that since the commencement a semi-annual instalment of interest had become due; that Tenney had caused the real estate to be sold by virtue of the power contained in the mortgage, had applied a part of the proceeds of the sale in liquidation of that interest, and, since the maturity of the note, had applied the balance of the proceeds in part payment of the note, and had commenced an action against the plaintiff to recover the balance of said note (due demand having been made and notice given), which action is now pending.

Defendant requested the judge to rule that, upon the foregoing facts, the plaintiff could not maintain his action, but, if he could, that he was entitled to recover only nominal damages. The judge declined so to rule, and held that defendant was liable for the conversion of the note, and that the measure of the plaintiff's damages was the amount which the plaintiff was legally compellable to pay to the holder of the note, namely, the face of the note and interest, less the amount realized from the sale under the mortgage, treating the same as a partial payment. Defendant excepted.

G. D. Robinson, for defendant.

I. D. Van Duzee, for plaintiff.

COLT, J. [After deciding that there was no conversion of the note.] The further objection is, that treating this as an action to recover damages for an alleged fraud, the plaintiff shows no damages sustained at the time his action was commenced. It was then uncertain and contingent whether he would ever be called on to pay the note. It was payable to the plaintiff or order in two years, and was dated in July, 1873, shortly before its transfer by his indorsement to the defendant. The liability of the plaintiff depended on the failure of the makers

to pay and the giving of due notice to him as indorser. No payment has in fact ever been made by him. If the holder receives his pay from the makers through the mortgage security or otherwise, the plaintiff will have suffered no actionable wrong. There will have been no concurrence of damage with fraud, within the rule on which such actions are founded. And as there has been no invasion of the plaintiff's right, no breach of promise, and no interference with his property, there can be no recovery of even nominal damages in this action. *Pasley* v. *Freeman*, 3 T. R. 51; 2 Smith Lead. Cas. (6th Am. ed.) 157, and notes. *Exceptions sustained.*

SIEBECKER, J., IN LUETZKE *v.* ROBERTS.

1906. 130 *Wisconsin*, 97, p. 106.

[PLAINTIFFS, by fraudulent representations of defendants, were induced to execute promissory notes to defendants. Upon a proceeding to cancel and annul the notes, it appeared that the notes had been transferred to, and were then held by, *bona fide* purchasers for value; and hence could not be decreed to be cancelled. It was *held*, that the court having jurisdiction of the defendants personally, had power to render judgment for damages. The opinion then proceeds as follows: —]

SIEBECKER, J. It is urged that compensatory damages cannot be awarded because they are not ascertainable under the facts found, and that plaintiffs must wait until they have made actual payment of the notes. This contention cannot be sustained. The court properly held that these notes in the hands of *bona fide* purchasers for value established a liability according to their terms against these plaintiffs, and that such liability was measured by the amount they call for on their face with interest. We deem this the correct measure of damages in the case, and within the principle of the case of *Lyle* v. *McCormick H. M. Co.*, 108 Wisc. 81, 84 N. W. 18.[1]

FOTTLER v. MOSELEY.

1904. 185 *Massachusetts*, 563.

TORT for deceit, alleging, that, relying upon the false and fraudulent representations of the defendant, a broker, that certain sales of the stock of the Franklin Park Land Improvement Company in the Boston Stock Exchange from January 1 to March 27, 1893, were genuine transactions, the plaintiff revoked an order for the sale of certain shares of that stock held for him by the defendant, whereby the plaintiff suffered loss. Writ dated February 17, 1896.

At the first trial of the case in the Superior Court a verdict was

[1] Compare CARPENTER, J., in *Ely* v. *Stannard*, 46 Conn. 124, pp. 127, 129. — ED.

ordered for the defendant, and the exceptions of the plaintiff were sustained by this court in a decision reported in 179 Mass. 295. At the new trial in the Superior Court before Sherman, J., it appeared that one Moody Merrill, a director and officer of the Franklin Park Land Improvement Company, absconded late in May or early in June of 1893, and that immediately upon his departure it was discovered that he had embezzled nearly $100,000 of the funds of that company, the result of which was that the market price of the stock immediately fell and the stock could not be sold; that the plaintiff from the time of the discovery of the defendant's alleged fraud did his best to sell his stock, but was unable to do so at more than $3 a share, at which price he sold it after bringing this action.

The plaintiff among other requests asked the judge to rule, "That it is of no consequence so far as the defendant's liability is concerned that an outside intervening cause has been the sole or contributing cause of the decline in price to which the plaintiff's loss is due."

The judge refused this and other rulings requested by the plaintiff, and instructed the jury, among other things, as follows: —

"If you find the fair market value of that stock was always above what it was fictitiously quoted, or equal to it, and that it was so on the 25th of March, 1893, and remained so and would have remained so, except for the embezzlement and absconding of Moody Merrill, then the plaintiff is not entitled to recover.

"If you find that Moody Merrill's going away did destroy the value of the stock, practically destroy its value, then the plaintiff is not entitled to recover anything.

"You may take all the evidence on this subject, the fact of what Moody Merrill did, and what effect it had upon the market value of this stock, and if that destroyed the market value, then, as I have told you, the plaintiff is not entitled to recover anything. If his going away and embezzlement did not affect the market value of this stock, then the plaintiff may recover the full value of it."

The judge submitted to the jury the following questions, which the jury answered as stated below: —

"1. Did the defendant make a representation to the plaintiff on or about March 25, 1893, that the quotations in the Boston Stock Exchange of Franklin Park Land and Improvement Company stock were quotations of actual and true sales?" The jury answered "Yes."

"2. Were such quotations at or about the same sum as the quotations of actual sales and the sales at public auction?" The jury answered "Yes."

"3. What was the fair market value of said stock on or about March 25, 1893?" The jury answed "$28.50 per share."

"4. What was the fair market value of said stock on the last day of May, or immediately prior to June, 1893, the day before Moody Merrill's absconding?" The jury answered "$27.75 per share."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

R. W. Nason, for the plaintiff.

B. L. M. Tower (*E. O. Hiler* with him), for the defendant.

KNOWLTON, C. J. The parties and the court seem to have assumed that the evidence was such as to warrant a verdict for the plaintiff under the law stated at the previous decision in this case, reported in 179 Mass. 295, if the diminution in the selling price of the stock came from common causes. The defendant's contention is that the embezzlement of an officer of a corporation, being an unlawful act of a third person, should be treated as a new and independent cause of the loss, not contemplated by the defendant, for which he is not liable.

To create a liability, it never is necessary that a wrongdoer should contemplate the particulars of the injury from his wrongful act, nor the precise way in which the damages will be inflicted. He need not even expect that damage will result at all, if he does that which is unlawful and which involves a risk of injury. An embezzler is criminally liable, notwithstanding that he expects to return the money appropriated after having used it. If the defendant fraudulently induced the plaintiff to refrain from selling his stock when he was about to sell it, he did him a wrong, and a natural consequence of the wrong for which he was liable was the possibility of loss from diminution in the value of the stock, from any one of numerous causes. Most, if not all, of the causes which would be likely to affect the value of the stock, would be acts of third persons, or at least conditions for which neither the plaintiff nor the defendant would be primarily responsible. Acts of the officers, honest or dishonest, in the management of the corporation, would be among the most common causes of a change in value. The defendant, if he fraudulently induced the plaintiff to keep his stock, took the risk of all such changes. The loss to the plaintiff from the fraud is as direct and proximate, if he was induced to hold his stock until an embezzlement was discovered, as if the value had been diminished by a fire which destroyed a large part of the property of the corporation, or by the unexpected bankruptcy of a debtor who owed the corporation a large sum. Neither the plaintiff nor the defendant would be presumed to have contemplated all the particulars of the risk of diminution in value for which the defendant made himself liable by his fraudulent representations. It would be unjust to the plaintiff in such a case, and impracticable, to enter upon an inquiry as to the cause of the fall in value, if the plaintiff suffered from the fall wholly by reason of the defendant's fraud. The risk of a fall, from whatever cause, is presumed to have been contemplated by the defendant when he falsely and fraudulently induced the plaintiff to retain his stock.

We do not intimate that these circumstances, as well as others, may not properly be considered in determining whether the plaintiff was

acting under the inducement of the fraudulent representations in continuing to hold the stock up to the time of the discovery of the embezzlement. The false representations may or may not have ceased to operate as an inducement as to the disposition of his stock before that time. Of course there can be no recovery, except for the direct results of the fraud. But if the case is so far established that the plaintiff, immediately upon the discovery of the embezzlement, was entitled to recover on the ground that he was then holding the stock in reliance upon the fraudulent statements, and if the great diminution in value came while he was holding it, the fact that this diminution was brought about by the embezzlement of an officer leaves the plaintiff's right no less than if it had come from an ordinary loss.

Exceptions sustained.[1]

MORSE *v.* HUTCHINS.

1869. 102 *Massachusetts*, 439.

Tort for deceit in making false and fraudulent representations to the plaintiff touching the business and profits of a firm of which the defendant was a member, and thereby inducing the plaintiff to buy the interest of the defendant in the stock and good will of the firm. A count in contract for the same cause of action was joined. Answer, a general denial and a plea of a discharge in bankruptcy.

At the trial in the superior court, Brigham, C. J., ruled that the discharge in bankruptcy was a defence to the second count, but not to the first count; and the plaintiff relied on the first count only.

The judge instructed the jury that "the measure of damages would be the difference between the actual value of the stock and good will purchased at the time of the purchase and the value of the same had the representation been true."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

H. B. Staples, for the defendant.

G. F. Verry, for the plaintiff.

Gray, J. The objections that either the joinder of a count in contract with the count in tort, or the certificate of discharge in bankruptcy, would defeat the plaintiff's right of action in tort for the defendant's false and fraudulent representations, were hardly relied on

[1] "But there is one thing which intervenes between the *injuria* and the *damnum*, and that is the plaintiff's *action* which results in damage. It is clear that a misrepresentation cannot of itself directly produce damage. It requires a means of conveyance, and that is the action which it produces, and which results in damage."

". . . It is the action of the plaintiff, and not the damage, which must be materially induced by the misrepresentation."

"The fallacy is in regarding the damage, and the action resulting in damage, as the same thing." Moncrieff's Law of Fraud and Misrepresentation, 187. — Ed.

at the argument, and are groundless. Gen. Sts. c. 129, § 2, cl. 5. *Crafts* v. *Belden*, 99 Mass. 535. U. S. St. 1867, c. 176, § 33.

The rule of damages was rightly stated to the jury. It is now well settled that, in actions for deceit or breach of warranty, the measure of damages is the difference between the actual value of the property at the time of the purchase and its value if the property had been what it was represented or warranted to be. *Stiles* v. *White*, 11 Met. 356; *Tuttle* v. *Brown*, 4 Gray, 457; *Whitmore* v. *South Boston Iron Co.*, 2 Allen, 52; *Fisk* v. *Hicks*, 11 Foster, 535; *Woodward* v. *Thacher*, 21 Verm. 580; *Muller* v. *Eno*, 4 Kernan, 597; *Sherwood* v. *Sutton*, 5 Mason, 1; *Loder* v. *Kekulé*, 3 C. B. (N. S.) 128; *Dingle* v. *Hare*, 7 C. B. (N. S.) 145; *Jones* v. *Just*, Law Rep. 3 Q. B. 197. This is the only rule which will give the purchaser adequate damages for not having the thing which the defendant undertook to sell him. To allow to the plaintiff (as the learned counsel for the defendant argued in this case) only the difference between the real value of the property and the price which he was induced to pay for it would be to make any advantage lawfully secured to the innocent purchaser in the original bargain inure to the benefit of the wrongdoer; and, in proportion as the original price was low, would afford a protection to the party who had broken, at the expense of the party who was ready to abide by, the terms of the contract. The fact that the property sold was of such a character as to make it difficult to ascertain with exactness what its value would have been if it had conformed to the contract affords no reason for exempting the defendant from any part of the direct consequences of his fraud. And the value may be estimated as easily in this action as in an action against him for an entire refusal to perform his contract.

Exceptions overruled.

SMITH *v.* BOLLES.

1889. 132 *United States*, 125.[1]

ERROR to the United States Circuit Court for the Northern District of Ohio.

Action to recover damages for fraudulent representations in the sale of shares of mining stock.

The amended petition alleged (*inter alia*) that plaintiff was induced by defendant's fraudulent representations to buy of defendant four thousand shares of mining stock at $1.50 per share, amounting to $6000; that "said stock and mining property was then, and still is, wholly worthless; and that had the same been as represented by defendant it would have been worth at least ten dollars per share;

[1] Statement abridged. Citations of counsel omitted.—ED.

and so plaintiff says that by reason of the premises he has sustained damages to the amount of forty thousand dollars."

Answer, denying plaintiff's material allegations. Trial by jury. The instructions given as to damages are stated in the opinion. Verdict for plaintiff. Motion for new trial overruled. Judgment for plaintiff. Defendant brought error.

W. W. Boynton (*J. C. Hale* and *Edward H. Fitch* with him), for plaintiff in error.

E. J. Estep, for defendant in error.

FULLER, C. J. The bill of exceptions states that the court charged the jury "as to the law by which the jury were to be governed in the assessment of damages under the issues made in the case," that "the measure of recovery is generally the difference between the contract price and the reasonable market value, if the property had been as represented to be, or in case the property or stock is entirely worthless, then its value is what it would have been worth if it had been as represented by the defendant, and as may be shown in the evidence before you."

In this there was error. The measure of damages was not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been worth the price paid for it; nor if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase. The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations, and so as to the other persons on whose claims the plaintiff sought to recover. If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged, and that the purchase of stock had been made in reliance thereon, then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability did not include the expected fruits of an unrealized speculation. The reasonable market value, if the property had been as represented, afforded, therefore, no proper element of recovery.

Nor had the contract price the bearing given to it by the court. What the plaintiff paid for the stock was properly put in evidence, not as the basis of the application of the rule in relation to the difference between the contract price and the market or actual value, but as establishing the loss he had sustained in that particular. If the stock had a value in fact, that would necessarily be applied in reduction of the damages. "The damage to be recovered must always be

the *natural and proximate consequence* of the act complained of," says Mr. Greenleaf, vol. ii, § 256; and "the test is," adds Chief Justice Beasley in *Crater* v. *Binninger*, 33 N. J. Law (4 Vroom), 513, 518, "that those results are proximate which the wrong-doer from his position must have contemplated as the probable consequence of his fraud or breach of contract." In that case, the plaintiff had been induced by the deceit of the defendant to enter into an oil speculation, and the defendant was held responsible for the moneys put into the scheme by the plaintiff in the ordinary course of the business, which moneys were lost, less the value of the interest which the plaintiff retained in the property held by those associated in the speculation.

[Remainder of opinion omitted.]

Judgment reversed. Cause remanded with a direction to grant a new trial.[1]

[1] This decision is reaffirmed in *Sigafus* v. *Porter*, 179 U. S. 116. In the latter case the court instructed the jury: "The measure of damages in actions of this nature is the difference between the value of the property as it proved to be and as it would have been as represented." This instruction was *held* erroneous.— ED.

SECTION VII.

Whether Plaintiff is barred by failing to use the Means at his Command to detect the Falsehood.

SCHWABACKER *v.* RIDDLE.

1881. 99 *Illinois*, 343.[1]

ACTION for deceit, brought by Riddle against Schwabacker *et als.*; alleging that, in the purchase of property to be taken at the invoice price, Riddle was cheated out of the sum of $2677.09 by fraudulent representations made by defendants in regard to the amount the goods purchased inventoried. On trial there was a verdict for plaintiff. Some of the instructions are stated in the opinion. Judgment in favor of Riddle. Schwabacker *et als.* appealed.

D. McCulloch and *James & Jack*, for appellants.

Barnes & Muir, for appellee.

CRAIG, C. J. . . . Instruction No. 2 reads as follows: —

"If a party misrepresents a fact within his own knowledge, to the injury of a third party, an action will lie for damages, if any, for such misrepresentation."

This instruction is liable to several serious objections. In the first place, a misrepresentation, to be actionable, must be a material one, or no action will lie. In the second place, in an action for deceit no recovery can be had unless the plaintiff himself exercised ordinary prudence to guard against the deception and fraud practised upon him, unless he has been thrown off his guard by the other party. These two principles were entirely ignored by the instruction, and the jury, under this direction of the court, was at liberty to find against the defendants if they misrepresented any immaterial fact, however remote, and the plaintiff exercised no precaution whatever to guard against imposition. This is not a sound rule to be adopted, and as the instruction was calculated to mislead the jury, it ought not to have been given.

. . . . . .

Instruction No. 13, given for the plaintiff, reads as follows: —

"It is not necessary, in this case, that the plaintiff should show any prior conspiracy or combination between the defendants to defraud the plaintiff; it is enough if the evidence shows that a sale was made to Riddle, or Riddle and Fosbender, and that the agreed price was for the value of the property, as shown by a certain invoice, and that

[1] Statement abridged; arguments omitted; also part of opinion. — ED.

notes were to be taken for the amount, and that the defendants had notes drawn for $2677.09 more than the value of the property as shown by such invoice; and if the plaintiff, before signing the notes, asked if they were for the amount of the invoice, and Fosbender said they were, in the presence and hearing of the other defendants, and if Riddle relied upon such statement in signing the notes, which was known to the defendants, then such conduct and representations would amount to a fraud in the other defendants, if they resulted in damages to the plaintiff."

[After stating an objection to this instruction.]

Again, under this instruction a recovery may be had although the plaintiff was deceived from a total want of reasonable care on his part. At the time the notes were signed, as we understand the evidence of plaintiff himself, the invoice, which showed the correct amount of the goods, was present, and in the hands of one of the defendants. If that be true, and it could have been obtained and inspected by the plaintiff, and he failed and neglected to do so, but relied upon a statement made by Fosbender at the time, it was for the jury to determine whether, under the evidence, he had exercised proper diligence to guard against deception, and if he did not, he could not recover. But this principle was ignored in this and other instructions given for the plaintiff. Indeed, this principle is not stated, but seems to be ignored in all of the instructions given for the plaintiff. This last instruction, in our judgment, was calculated to mislead the jury.

. . . . . .

Judgment reversed.

FARGO GAS & COKE COMPANY *v.* FARGO GAS & ELECTRIC COMPANY.

1894. 4 *North Dakota*, 219.[1]

Corliss, J. The plaintiff has recovered judgment for the balance of the purchase price of a gas and electric plant located in the City of Fargo, N. D., sold by plaintiff to the defendant. A portion of the consideration was paid, and, upon being sued for the unpaid portion of the purchase price, defendant set up as a defence a partial failure of consideration from the nondelivery of some of the property purchased, and also a counterclaim for damages arising out of the alleged deceit of the plaintiff in making the sale. The view we take of the case renders a more particular reference to the defence of partial failure of consideration unnecessary. We will confine ourselves to the single question of fraud. The property purchased consisted of a gas plant, with mains and all the other classes of property which go to

[1] Arguments omitted; also part of opinion. — Ed.

make up such a plant, and also an arc electric light plant, with poles, wires, and other fixtures distributed over different parts of the City of Fargo. These two plants were used by the plaintiff at the time of making the sale thereof to defendant, to light the public streets of the City of Fargo, its public buildings, stores, hotels, and dwelling houses, and had been so used for some time prior to such sale. The alleged fraudulent representations were of two classes, — one class relating to the physical condition of the plant, embracing statements as to the number of miles of wire, the number of poles, the gas mains, and as to the condition of the plant in other respects; and the other class related to the net earnings of the plant for the previous year, and the prices charged customers for gas and electric light. It appears that defendant relied chiefly upon the earning capacity of the plant in making the purchase, and was induced to believe that its net annual earnings would equal 10 per cent. of the purchase price ($85,300,) because of the statements of the plaintiff's officers that its net earnings during the past year had been $8913. There was evidence tending to show that this statement was false, and that it must have been known to be false by plaintiff's officers who negotiated the sale. Having in this brief manner set forth the general character of the property sold, and the general nature of the fraudulent representations upon which defendant's counterclaim for deceit was founded, we can now intelligently turn to what we regard as a fatal error in the case.

In the course of his charge to the jury, the learned trial judge instructed them as follows: "If the means were at the defendant's hands to discover the truth or untruth of the plaintiff's statements with regard to the amount and character of the property, defendant must be presumed to have had a knowledge of the actual facts." This instruction must be considered in the light of the refusal of the court to charge the jury as follows, at the request of defendant's counsel: "If you find that, during the negotiations, statements were made by the plaintiff as to the earnings of the plant, the defendant had a right to rely upon these statements; and if they were so relied on, and were false, and the defendant suffered injury thereby, the defendant would be entitled to recover the damages which it suffered in consequence thereof." It is apparent from this refusal to charge, and from the charge as cited given, that the court told the jury that, as a matter of law, defendant did not have the right implicitly to rely upon the representations of the plaintiff touching the character of the plant, but must make inquiries concerning them, and must make investigation as to their truth or falsity. It is true that the word "investigate" is not used; but, when we consider the nature of the property and the character of the representations made, it is obvious that something more than a mere inspection of an object present before a purchaser was necessary in order to enable the purchaser in this case to "discover" the truth or falsity of plaintiff's statements. Such an

instruction to a jury might be appropriate in an action in which fraud in the sale of a horse was set up, the seller having represented the horse to be perfectly sound, and it appearing that the horse stood before the purchaser at the time the representation was made, and that the only defect consisted in the absence of a leg, easily discernible by the ordinary use of eyesight. But in the case at bar the means of discovering the truth or untruth of these false statements were not at hand in the sense that they must have been employed before the seller could be held responsible for his fraudulent representations; and, when this language was used, the jury must have drawn the inference from the fact that this plant was in the same city, and could be investigated with respect to its condition and its earnings, and the prices charged customers for gas and electric light, and with reference to the other features embraced in the statements made by plaintiff on the sale, that therefore the means were at hand, within the rule laid down by the court requiring the purchaser to discover at its peril the truth or falsity of the statements made. Such a rule of law would be unjust and intolerable. When parties deal at arm's length, the doctrine of *caveat emptor* applies; but the moment the vendor makes a false statement of fact, and its falsity is not palpable to the purchaser, he has an undoubted right implicitly to rely upon it. That would, indeed, be a strange rule of law which, when the seller had successfully entrapped his victim by false statements, and was called to account in a court of justice for his deceit, would permit him to escape by urging the folly of his dupe for not suspecting that he, the seller, was a knave. In the absence of such a suspicion, it is entirely reasonable for one to put faith in the deliberate representations of another. The jury must have understood that the means were at hand to discover the claim, because the defendant might have measured the wire, counted the poles, examined the gas mains, ascertained how much customers were paying for gas and electric light, and might have hired an expert to examine into the earnings and expenses of the plaintiff in running the plant, with a view to discovering whether a business man had told the truth. It should not have been left to the jury to determine whether the means were at hand to discover the falsity of the statements made, in view of the character of such statements and the nature of the property sold. The defendant as a matter of law, had a right to rely implicitly upon the statements made by plaintiff touching the character of this plant. So long as defendant did not actually know the representations to be false, it was under no obligation to investigate to determine their truth or falsity. In *Mead* v. *Bunn*, 32 N. Y. 280, the court say: "Every contracting party has an absolute right to rely on the express statements of an existing fact, the truth of which is known to the opposite party and unknown to him, as a basis of mutual engagement, and he is under no obligation to investigate and verify statements, to the truth of which the other party to the contract, with full means of knowledge, has delib-

erately pledged his faith." In *Redding* v. *Wright*, (Minn.) 51 N. W. 1056 (a case very much in point), the court say: "If the representations were fraudulently made with the intent to induce the plaintiff to rely upon the fact being as represented, and to act upon the belief thus induced, the wrongdoer who succeeds in such a purpose is not to be shielded from responsibility by the plea that the defrauded party would have discovered the falsity of the representation if he had pursued such means of information as were available to him." While the rule has been in some cases stated in terms more favorable to plaintiff, yet no decision can be found which establishes a doctrine under which defendant would be bound, under the circumstances of this case, to make any investigation or inquiry touching the truth or falsity of the statements made in connection with the sale. There are many well considered cases which sustain our view that defendant had a right implicitly to rely upon the representations made by plaintiff with respect to the character of the property to be purchased by defendant. In addition to the cases already cited, we refer to *Maxfield* v. *Schwartz*, 45 Minn. 150, 47 N. W. 448; *Gardner* v. *Trenary*, 65 Iowa, 646, 22 N. W. 912; *Schumaker* v. *Mather*, 133 N. Y. 590, 30 N. E. 755; *McClellan* v. *Scott*, 24 Wis. 81; *Caldwell* v. *Henry*, 76 Mo. 254; *Oswald* v. *McGehee*, 28 Miss. 340; *Cottrill* v. *Krum*, 100 Mo. 397, 13 S. W. 753; *Campbell* v. *Frankern*, 65 Ind. 591; Kerr, Fraud & M. 77, 80, 81; *Erickson* v. *Fisher*, (Minn.) 53 N. W. 638; *Alfred Shrimpton & Sons* v. *Philbrik*, (Minn.) 55 N. W. 551; *Barndt* v. *Frederick*, (Wis.) 47 N. W. 6; Bigelow, Fraud, 522, 528. We are aware that cases can be found which exact from the buyer more care in ascertaining the truth or falsity of representations than the decisions just cited. These cases appear to us to have been rightfully decided, in view of the facts. In determining what the courts in such cases intended to hold, the language of each opinion must be read, in the light of the facts of the particular case. The unmistakable drift is towards the just doctrine that the wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of his victim. The falsity of the statement may be apparent because the thing misrepresented is before the buyer, and the most casual look will suffice to discover the falsehood, no artifice being used to divert his attention; or the statement may carry its own refutation upon its face, — may be so absurd or monstrous that it is palpably false, as a statement by a person carrying on a business known to the purchaser to be very small that the receipts of the business are a million dollars a year. In these and other similar cases the law will not allow a person to assert that he was deceived. But the general rule is, and, upon principle, must be, that the question is one of reliance by the buyer upon the false statement of the seller. Whether it was wise for him to rely upon it, whether he was prudent in so doing, whether he is not chargeable with negligence in a certain sense in not investigating, — these inquiries are, in general, immaterial, provided the purchaser

has in fact been deceived. The circumstances under which fraud is accomplished are so varied, the nature of the property and the character of the misrepresentations are so widely different, in different cases, that it is unwise to attempt to enunciate with precision a general rule by which all cases shall be governed. It is better to decide the cases as they arise, keeping in view the general principle that courts will not readily listen to the plea that the defrauded party was too easily deceived. For this error in the charge, the judgment will be reversed, and a new trial granted.

[Omitting opinion on another point.]

Judgment reversed. New trial ordered.

SAVAGE, J., IN EASTERN TRUST & BANKING COMPANY *v.* CUNNINGHAM.

Supreme Court of Maine, 1908. 70 *Atlantic Reporter*, 17, p. 22.

SAVAGE, J. But the defendant contends further, that, if the plaintiff did not know, it ought to have known, and would have known but for its own negligence. We think this defence cannot avail. There are cases which hold that where one carelessly relies upon a pretence of inherent absurdity and incredibility upon mere idle talk, or upon a device so shadowy as not to be capable of imposing upon any one, he must bear his misfortune, if injured. He must not shut his eyes to what is palpably before him. But that doctrine, if sound, is not applicable here. We think the well-settled rule to be applied here is that if one intentionally misrepresents to another facts particularly within his own knowledge, with an intent that the other shall act upon them, and he does so act, he cannot afterwards excuse himself by saying, "You were foolish to believe me." It does not lie in his mouth to say that the one trusting him was negligent. In this case the fact whether or not there were funds in the Gardiner bank to meet the checks was peculiarly within the knowledge of the defendant. The rule is stated in Pollock on Torts, § 252, as follows: "It is now settled law that one who chooses to make positive assertions without warrant shall not excuse himself by saying that the other party need not have relied upon them. He must show that his representation was not in fact relied upon. In short, nothing will excuse a culpable misrepresentation short of proof that it was not relied upon, either because the other party knew the truth, or because he relied wholly on his own investigations, or because the alleged fact did not influence his action at all." In *Linington* v. *Strong*, 107 Ill. 295, we find this language: "The doctrine is well settled that as a rule a party guilty of fraudulent conduct shall not be allowed to cry 'negligence'

as against his own deliberate fraud. . . . While the law does require of all parties the exercise of reasonable prudence in the business of life, and does not permit one to rest indifferent in reliance upon the interested representations of an adverse party, still, as before suggested, there is a certain limitation to this rule; and, as between the original parties to the transaction, we consider that, when it appears that one party has been guilty of an intentional and deliberate fraud by which to his knowledge the other party has been misled or influenced in his action, he cannot escape the legal consequences of his fraudulent conduct by saying that the fraud might have been discovered had the party whom he deceived exercised reasonable diligence and care." See *Griffin* v. *Roanoke R. & Lumber Co.*, 140 N. C. 514, 53 S. E. 307, 6 L. R. A. (N. S.) 463.[1]

S. PEARSON & SON, LIMITED, APPELLANTS, *v.* LORD MAYOR, &c., OF DUBLIN, RESPONDENTS.

1907. *Law Reports* (1907) *Appeal Cases*, 351.[2]

THE Dublin Corporation having by their agents furnished the appellants with plans, drawings, and specifications, the appellants contracted to execute certain sewage outfall works according to the plans, &c. In the plans, &c., representations were made as to the existence and position of a certain wall. In the contract (clauses 43, 46, 47, 48) it was stipulated that the contractor should satisfy himself as to the dimensions, levels and nature of all existing works and other things connected with the contract works; that the corporation did not hold itself responsible for the accuracy of the information as to the sections or foundations of existing walls and works; and that no charges for extra work or otherwise would be allowed in consequence of incorrect information or inaccuracies in the drawings or specifications. The appellants performed the contract, and brought an action of deceit against the corporation, claiming damages for false representations as to the position, dimensions and foundations of the wall, whereby the appellants were compelled to execute more costly works than would otherwise have been required. The plans, drawings and specifications were prepared by engineers employed by the corporation.

[At the trial before PALLES, C. B., the plaintiffs offered evidence

[1] CARPENTER, J., IN SMITH *v.* McDONALD.

1905. 139 *Michigan*, 225, p. 229.

CARPENTER, J. This contention assumes that the defrauded party owes to the party who defrauded him a duty to use diligence to discover the fraud. There is no such obligation. One who perpetrates a fraud cannot complain because his victim continues to have a confidence which a more vigilant person could not have.

[2] Statement abridged. Only portions of the opinions are given. — ED.

tending to show that the aforesaid representations were not sincerely believed by the engineers to be true.] PALLES, C. B., refused to leave any question to the jury, and entered judgment for the respondents on the ground that the contractors were bound by their contract to verify for themselves all the information given in the plans, &c.

The King's Bench Division (Wright, Boyd, and Gibson, JJ., Lord O'Brien, C. J., dissenting) reversed the decision of Palles, C. B., and entered judgment for the appellants on the ground that there was a question of fact for the jury upon the allegation of fraud.

The Court of Appeal (Sir Samuel Walker, L. C., Fitzgibbon and Holmes, L. JJ.) reversed that decision, and restored the decision of Palles, C. B.

Plaintiff appealed to the House of Lords.

The House of Lords (LORDS LOREBURN, HALSBURY, ASHBOURNE, MACNAGHTEN, JAMES OF HEREFORD, ROBERTSON, ATKINSON, and COLLINS) reversed the order of the Court of Appeals, and restored the judgment of the King's Bench Division. Portions of the opinions are as follows: —

LORD LOREBURN, L. C. . . . Now it seems clear that no one can escape liability for his own fraudulent statements by inserting in a contract a clause that the other party shall not rely upon them. I will not say that a man himself innocent may not under any circumstances, however peculiar, guard himself by apt and express clauses from liability for the fraud of his own agents. It suffices to say that in my opinion the clauses before us do not admit of such a construction. They contemplate honesty on both sides and protect only against honest mistakes. The principal and the agent are one, and it does not signify which of them made the incriminated statement or which of them possessed the guilty knowledge.

. . . . . .

EARL OF HALSBURY. . . . The action is based on the allegation of fraud, and no subtilty of language, no craft or machinery in the form of contract, can estop a person who complains that he has been defrauded from having that question of fact submitted to a jury. . . .

LORD ASHBOURNE. . . . [As to clause 43.] Such a clause might in some cases be part of a fraud, and might advance and disguise a fraud, and I cannot think that on the facts and circumstances of this case it can have such a wide and perilous application as was contended for. Such a clause may be appropriate and fairly apply to errors, inaccuracies, and mistakes, but not to cases like the present. . . .

LORD JAMES OF HEREFORD. . . . Now the learned Chief Baron in respect of this clause expressed the opinion that the contractor was not entitled in point of law to say he acted upon the statement contained in the plans. He was told to act upon his own judgment, and ought to have done so.

If this dictum be read as general in its terms, and so applied, it may

be read as conferring considerable advantage upon the designers of fraud. At any rate, by inserting such a clause those who framed it would run a fair chance of the contractor saying, "I assume that those with whom I deal are honest and honorable men. I scout the idea of their being guilty of fraud. An inquiry testing the plan will be expensive and difficult, and so I will not make it." The protecting clause might be inserted fraudulently, with the purpose and hope that, notwithstanding its terms, no test would take place. When the fraud succeeds, surely those who designed the fraudulent protection cannot take advantage of it. Such a clause would be good protection against any mistake or miscalculation, but fraud vitiates every contract and every clause in it. As a general principle I incline to the view that an express term that fraud shall not vitiate a contract would be bad in law, but it is unnecessary in this case to determine whether special circumstances may not create an exception to that rule.

. . . . . .

LORD ATKINSON. . . . If, therefore, the *direction* given to the jury is to be upheld on the grounds upon which it was purported to be based, it must, in my opinion, be because these several articles of the contract, on their true construction, are to be held to embody a contract by the plaintiffs that they in effect are not, under any circumstances, to have a remedy by action for deceit for any fraud which may be practised upon them by the defendants or by those acting on their behalf in the nature of a false representation, that is a contract to submit to a fraud.

As at present advised I am inclined to think, on the authority of *Tullis* v. *Jacson*, [1892] 3 Ch. 441, and *Brownlie* v. *Campbell*, (1880) 5 App. Cas. 925, 937, 956, that such a contract would be illegal in point of law. And, with the most profound respect for the Chief Baron, I do not think that the articles of the contract relied upon can, on their true construction, be held to have had fraud, whether conscious or unconscious, within their purview or contemplation, or to apply at all to such a case of fraud as the present is alleged to be. They were, I think, intended to apply, and do apply, to inaccuracies, errors, and mistakes, or matters of that sort, but not to fraud, whether of principal or agent, or of both combined.

. . . . . .

CHAPTER XV.

JOINT WRONG-DOERS.

SECTION I.

Who are Joint Wrong-doers.

MASON v. COPELAND.

1905. 27 *Rhode Island*, 232.[1]

Trespass on the Case. Heard on demurrers to declaration, and demurrers sustained.

Dubois, J. The plaintiff has brought this action for negligence against a copartnership and a corporation, and charges in the first count of his declaration that the copartners, proprietors of a livery stable, let out to the plaintiff, for the use of his wife, horses and a carriage in charge of their servant, a driver, and that he so negligently drove and managed the horses that they became frightened and unmanageable and ran away, upsetting the carriage and injuring the wife of the plaintiff to his damage.

The second count charges the copartners with negligence in letting the horses, which they knew, or ought to have known, were dangerous, easily frightened, and likely to become unmanageable.

The third count is against the firm and The Rhode Island Company, a corporation, jointly, for the negligence of the driver in managing the horses and the negligence of the motorman of the corporation in bringing a car under his control to a sudden stop, just behind the carriage in which the plaintiff's wife was seated, by applying the brakes in such a manner as to cause a terrifying noise, or shriek, so that, by reason of the simultaneous and concurrent negligence of the driver and motorman, the horses became frightened, ran away, and overturned the carriage, injuring the plaintiff's wife, etc.

The fourth count alleges a further joint negligence on the part of the firm and corporation by combining together negligence of the copartnership in furnishing the unsafe horses, as set out in the second count, and negligence of the motorman of the corporation in running its car violently against the rear of the carriage, thus causing injury to the plaintiff's wife.

[1] Statement abridged. — Ed.

The fifth count is against The Rhode Island Company alone, for its negligence set out in the third count, and the sixth count is against the same corporation for the negligence alleged in the fourth count.

[To this declaration the copartners demurred on various specified grounds.]

The following questions of law are raised by the demurrer: —

First. Whether under Gen. Laws, cap. 233, sec. 20, the plaintiff in a case like this can join in one declaration several counts against two or more defendants, with each other, and with joint counts against both.

Second. Whether in such circumstances as those alleged in the third and fourth counts of this declaration, joint counts against two defendants acting independently of each other are proper.

These questions must be answered in the negative. As fully explained in *Phenix Iron Foundry* v. *Lockwood*, 21 R. I. 556, the statute does not authorize the joinder of distinct causes of action against separate defendants.[1]

The plaintiff is mistaken in saying that in the case at bar there is only one cause of action, one injury, and one damage, and that the only question is which of two parties, if either, is responsible. The duty which the defendant firm owed to the plaintiff is essentially different from that imposed upon the street railway corporation, and the tort of the former, which is alleged to consist in letting horses known to be intractable or in charge of an incompetent driver, is not the same tort as that charged upon the latter, which consisted in negligently stopping an electric car to the injury of a person not a passenger thereon, although the two torts may have culminated in one injury. There is no question properly raised in this declaration as to which party is responsible. If the declaration is true, both parties are responsible in separate actions. The case does not present the concurrence of intention in the commission of a tort which is necessary to make a joint tort; the mere unintentional concurrence of the acts of two distinct parties resulting in damage to the plaintiff does not give him an action against the parties jointly, but a separate action against each of them. *Bennett* v. *Fifield*, 13 R. I. 139. As stated in *Cole* v. *Lippitt*, 22 R. I. 31: "A joint liability is not made out by patching together individual liabilities which may arise from different relations to the same transaction." While it is true that many of the cases cited by the plaintiff, from courts of different jurisdictions, measurably sustain his contention, in this State the stricter rule has been

[1] Gen. Laws of R. I., chap. 233, sects. 20-23, provide in substance, that when a plaintiff is in doubt as to the person from whom he is entitled to recover, he may join two or more defendants with a view of ascertaining which is liable; and that no action shall be defeated by the nonjoinder or misjoinder of parties. These provisions adopted in R. I. Pub. Laws, January, 1876, chap. 563, were taken from the English Judicature Act of 1873. To that Act, 36 & 37 Vict., chap. 66, a schedule of rules of procedure was appended, 8 L. R. Statutes, 350, and, under the head of Parties, the provisions contained in the R. I. Statute will be found. STINESS, J., in *Phenix Iron Foundry* v. *Lockwood*, 21 R. I. 556, p. 557. — ED.

adopted, and we see no good reason in this case for departing from it.

For these reasons the demurrer must be sustained.

Case remitted to the Common Pleas Division for further proceedings.

Comstock & Gardner and *William W. Moss*, for plaintiff.

David S. Baker and *Lewis A. Waterman*, for demurring defendants.[1]

MOONEY *v.* EDISON ETC., COMPANY.

1904. 185 *Massachusetts*, 547.

TORT against the Edison Electric Illuminating Company, the Old Colony Street Railway Company and the city of Boston, for injuries alleged to have been received by the plaintiff while lawfully travelling on Centre Street, a highway of the city of Boston, at or near Cass Street in that city, through the alleged negligence of the defendant corporations, by reason of which Centre Street became charged with electricity, and through the alleged negligence of the defendant city in suffering the highway to remain so charged, whereby it was rendered and remained dangerous and defective, causing the plaintiff's injuries, with allegations of notice to the defendant city of the time, place and cause of the plaintiff's injuries. Writ dated September 5, 1902.

The city of Boston demurred to the declaration on the grounds that the declaration did not state a legal cause of action against that defendant, and that the city was not liable jointly with the other defendants upon the alleged facts.

The Superior Court sustained the demurrer and ordered judgment for the city of Boston. The plaintiff appealed.

T. F. Meehan, for the plaintiff.

S. M. Child, for the city of Boston.

HAMMOND, J. The plaintiff seeks to hold the two private corpora-

[1] " . . . But an argument was presented to us which, it appears to me, was based upon a fallacy — that was that because the plaintiffs had claimed only one damage therefore their cause of action was necessarily one also, however many persons they chose to put on the writ as bringing about that one damage. It seems to me that that is no test at all. The damage is one thing, and the injuria is another. What constitutes the cause of action is the injuria, the wrong done by a separate tort feasor; and when we analyze this case (the facts are not in dispute) we find we are dealing with it upon the assumption that the two acts which were done, the one by the London County Council and the other by the New River Company, are entirely disconnected torts, each of them a separate injuria — if it be injuria at all — quite distinct one from the other. The one was done recently by the county council by excavation, and the other at a much earlier date by the water company allowing water from its mains to weaken the soil in front of the plaintiffs' property, and the joint result of those two independent torts has been that the plaintiffs' house has come down. The damage is one, but the causes of action which have led to that damage are two, committed by two distinct personalities." COLLINS, L. J., in *Thompson* v. *London County Council*, L. R. (1899) 1 Q. B. Div. 840, pp. 844, 845, as to plaintiffs' motion that the New River Company might be added as defendants in the action. — ED.

tions upon the ground that by their negligence the highway became charged with electricity, and the city of Boston upon the ground that it negligently suffered the highway to remain thus charged. As against the first two the liability rests solely upon the common law; as against the city, solely upon the statute. The private corporations had nothing to do with the negligence charged against the city, and the city had nothing to do with the negligence charged against the private corporations. The liability of the city depends upon statutory conditions and is limited in amount, while the liability of the other defendants depends upon conditions entirely different, and is measured only by the amount of damages suffered by the plaintiff. As between the defendants the liability of the private corporations is primary, that of the city secondary; and the city, in case of a recovery against it, could maintain an action against these other defendants to recover what it paid. *Boston* v. *Coon*, 175 Mass. 283, and cases cited.

From these considerations it is plain that neither in fact nor in legal intendment are these defendants joint tort feasors. They therefore cannot be held as such, and the declaration is bad. For cases illustrative of the principle involved, see *Parsons* v. *Winchell*, 5 Cush. 592; *Mulchey* v. *Methodist Religious Society*, 125 Mass. 487; *Ridley* v. *Knox*, 138 Mass. 83; *Dutton* v. *Lansdowne Borough*, 198 Penn. St. 563.

Demurrer sustained.

CITY OF PEORIA ET AL. *v.* SIMPSON.

1884. 110 *Illinois*, 294.[1]

THIS was an action to recover for personal injuries, and was brought by Robert Simpson, against the city of Peoria and Magnus Densberger. It is averred in the declaration that defendant Densberger was the owner of the premises situated on Water Street, in the city of Peoria, at the place where plaintiff was injured; that there was an opening into the cellar or vault in front of the premises, the covering to which constituted a part of the usual sidewalk; that the owner of the premises wrongfully and negligently permitted such opening to be and remain insufficiently and defectively covered, whereby the sidewalk was left in an unsafe condition; and that at that time, and prior thereto, the city was possessed of and had control of the sidewalk in front of the premises, and ought to have kept the same in good repair and safe condition. It is then further averred as a ground for recovery, that both defendants, well knowing the unsafe and dangerous condition of the sidewalk, wrongfully and negligently suffered the covering to such opening to remain in an insecure and unsafe condition, so that while plaintiff was passing over the sidewalk, in the

[1] Statement abridged. Arguments omitted. Only so much of the case is given as relates to a single point. — ED.

observance of due care, it broke, and he fell through the opening, into the cellar or vault, and thereby sustained severe injuries, by which he became paralyzed in his back and arm. Separate demurrers filed by each defendant were overruled by the court, and thereupon pleas of not guilty were filed by each defendant. A trial was had before a jury, who returned a verdict finding the issues for plaintiff, and assessing his damages at $6000. Motions for a new trial and in arrest of judgment were severally overruled, and the court entered judgment on the verdict. That judgment was afterwards affirmed in the Appellate Court for the Second District. The case comes to this court on the appeal of the city of Peoria, and since then defendant Densberger has also assigned errors on the same record.

George A. Wilson, for city of Peoria.

Jack & Moore, for Densberger.

Worthington & Page, for appellee.

Scott, J. A question not entirely free from doubt is, can the owner of the premises and the city be held jointly liable for the injuries to plaintiff in the same action. It is said this question cannot now be considered, for the reason defendants did not stand by their demurrers, the rule being familiar that a party may not at the same time plead and demur to the same pleading. It is also true any substantial defect in a declaration can always be taken advantage of by a motion in arrest of judgment, and that was done in this case.

It will be observed both defendants are charged with negligence as to the condition of the sidewalk that occasioned the injury to plaintiff, and why may they not be jointly liable in the same action? The owner is liable, if at all, because the premises were let with the nuisance upon them, and that liability, if any existed, continued, notwithstanding the possession of the tenant, and continued up to the time of the accident. On the hypothesis the city had notice, it was the duty of the municipal authorities to make repairs at and before the injury to plaintiff. The same duty rested upon the owner and the municipality, at the same time, to make such repairs, and both may therefore be said to be guilty of negligence in respect to the same thing. Had the action been brought against the owner and the tenant, no doubt it could have been maintained had it been averred and proved both were under obligations to make repairs, and both were guilty of negligence in that respect. The averment is, it was the duty of both the owner and the municipality to repair the sidewalk, and both are charged with the omission of a common duty in that regard, — and what reason is there why they may not be joined in the same action? Undoubtedly the rule is, for separate acts of trespass separately done, or for positive acts negligently done, although a single injury is inflicted, the parties cannot be jointly held liable to the party injured. If there is no concert of action — no common intent — there is no joint liability. This rule is very well settled by authority: Hilliard on Torts, sect. 10, p. 315; *Nav. Railroad and Coal Co.* v. *Richards*, 57 Pa.

St. 142; Shearman & Redfield on Negligence, 58; *Bard* v. *Yohn*, 26 Pa. St. 482.

But a different principle applies where the injury is the result of a neglect to perform a common duty resting on two or more persons, although there may be no concert of action between them. In such cases the party injured may have his election to sue all parties owing the common duty, or each separately, treating the liability as joint or separate. A familiar case illustrating the principle is, where a person is injured by the falling of a party wall erected on the dividing line between two lots owned by different persons, the action is maintainable jointly against both owners. It is for the reason it was a common duty of both owners to make the repairs. Another instance is, where a passenger is injured by a negligent collision of the trains of two railroad companies, he may maintain one action against both. And so it has been held an action may be maintained jointly against towns, where the law will authorize such an action, for an injury resulting from the insufficiency of a bridge which both towns are under an obligation to maintain. *Klauder* v. *McGrath*, 36 Pa. St. 128; *Colegrove* v. *N. Y., B. N. and N. H. R. R. Co.*, 6 Duer, 382; *Same* v. *Same*, 6 Smith (N. Y.) 492; *Peckham* v. *Burlington*, 1 Vt. 34. In *Bryant* v. *Bigelow Carpet Co.*, 131 Mass. 491, it was held, where the negligent acts of two defendants combined to produce the injury to plaintiff, a joint action could be maintained against both negligent parties.

It will be seen the rule recognized rests on sound principle, — that is, where an injury results from the concurrent negligence of several persons, all being under a common duty to observe care, though that duty is separate with reference to that which causes the injury, all are jointly liable. Applying this principle to the case being considered, it would seem to be conclusive as to the point made that the city and the owner are not jointly liable for the injury to plaintiff. If it shall be ascertained it was the duty of both the owner and the city to keep the sidewalk in repair, then the failure to do so was a common neglect, and the case comes precisely within the principle stated. Whether both or either party was under such duty, depends on facts to be found by the jury in the trial court.

As respects the point suggested whether the city could recover against the owner in case it was compelled to pay the judgment, is a question that does not affect the principle being considered. How the law may be on that subject need not now be determined. It is a question in which plaintiff can have no interest. As was said in *Bryant* v. *Bigelow Carpet Co.*, *supra*, the question of their relative rights and liabilities will be left to future litigation or adjustment between defendants. It is enough that it appears both defendants may have been guilty of negligence in regard to that which caused the injury to plaintiff, to enable him to maintain his action against them jointly.

[The court then considered the instructions to the jury; and *held*, that the judgment must be reversed on account of error in the instructions.]

FENEFF *v.* BOSTON & MAINE RAILROAD ET AL.

1907. 196 *Massachusetts*, 575.[1]

BRALEY, J. . . . In avoidance of this liability the defendant New York Central and Hudson River Railroad Company urges that two or more wrong-doers cannot be held jointly, unless, either in fact or by intendment of law, they coöperate in the perpetration of the wrong, as otherwise there would be a misjoinder of separate causes of action. Undoubtedly this is the general rule where two or more persons voluntarily unite in the act which constitutes the wrong, or the act is committed under such circumstances that they reasonably may be charged with intending the injurious consequences which follow. We refer only to a few illustrative cases. *Brown* v. *Perkins*, 1 Allen, 89; *Stone* v. *Dickinson*, 5 Allen, 29; *Barden* v. *Felch*, 109 Mass. 154; *Levi* v. *Brooks*, 121 Mass. 501; *Bath* v. *Metcalf*, 145 Mass. 274, 276; *Martin* v. *Golden*, 180 Mass. 549; *Parsons* v. *Winchell*, 5 Cush. 592; *Hawkesworth* v. *Thompson*, 98 Mass. 77; *Banfield* v. *Whipple*, 10 Allen, 27; *Mulchey* v. *Methodist Religious Society*, 125 Mass. 487, 489; *White* v. *Sawyer*, 16 Gray, 586, 589; *Pervear* v. *Kimball*, 8 Allen, 199, 200; *Swain* v. *Tennessee Copper Co.*, 111 Tenn. 430; *Hill* v. *Goodchild*, 5 Burr. 2790. It has been said by an eminent legal author that "in respect to negligent injuries, there is considerable difference of opinion as to what constitutes joint liability. No comprehensive general rule can be formulated which will harmonize all the authorities." 1 Cooley on Torts (3d ed.) 246. See Pollock on Torts (7th ed.), 194. But whatever diversity of opinion there may be elsewhere, the law here must be considered as settled, that if two or more wrong-doers negligently contribute to the personal injury of another by their several acts, which operate concurrently, so that in effect the damages suffered are rendered inseparable, they are jointly and severally liable. *Boston & Albany Railroad* v. *Shanly*, 107 Mass. 568, 579; *Bryant* v. *Bigelow Carpet Co.*, 131 Mass. 491, 503; *Corey* v. *Havener*, 182 Mass. 250; *Ouligh*an v. *Butler*, 189 Mass. 287, 293; *Flynn* v. *Butler*, 189 Mass. 377. A corresponding liability under similar conditions has been sustained in other jurisdictions. *Colegrove* v. *New York, New Haven & Hartford Railroad*, 20 N. Y. 492; *Barrett* v. *Third Avenue Railroad*, 45 N. Y. 628, 631; *Lynch* v. *Elektron Manuf. Co.*, 94 App. Div. (N. Y.) 408; *Tompkins* v. *Clay Street Railroad*, 66 Cal. 163; *Cuddy* v. *Horn*, 46 Mich. 596; *Matthews* v. *Delaware, Lackawanna & Western Railroad*, 27 Vroom, 34; *Electric Railway* v. *Shelton*, 89 Tenn. 423; *Wilder* v. *Stanley*, 65 Vt. 145; *McClellan* v. *St. Paul, Minneapolis & Manitoba Railway*, 58 Minn. 104; *Allison* v. *Hobbs*, 96 Maine, 26, 28, 29; *Wabash, St. Louis & Pacific Railway* v. *Shacklet*, 105 Ill. 364; *Graves* v. *City & Sub-*

[1] Statement omitted. Only so much of the opinion is given as relates to a single point. — ED.

urban Telegraph Association, 132 Fed. Rep. 387. The cases of *Parsons* v. *Winchell*, 5 Cush. 592, *Mulchey* v. *Methodist Religious Society*, 125 Mass. 487, *Harriott* v. *Plimpton*, 166 Mass. 585, *Mooney* v. *Edison Electric Illuminating Co.*, 185 Mass. 547, and *Fletcher* v. *Boston & Maine Railroad*, 187 Mass. 463, upon which the defendant relies as establishing a different rule, are to be distinguished. The first two decided that a master cannot be held responsible jointly with his servant nor a principal with his agent, for a tort committed by the servant or agent, when acting within the scope of their employment. In the third case, the joint action failed because no proof appeared of any coöperation between the defendants to procure a breach of the plaintiff's contract of marriage, while in the fourth, the measure of damages as well as the degree of liability being different and distinct as to the different defendants, the liability was said to be several. If, in the remaining case, it could have been said that the accident was chargeable solely to the railroad company, upon whom primarily rested the contractual duty of safely transporting the plaintiff and whose breach of this duty was the proximate cause of the injury, yet the decision in favor of the defendants well might rest, as the opinion states, upon his contributory negligence. In the present case the wrongful act was unintentional and arose solely from the concurrent negligence of the defendants, and, while it cannot be said that there was any concerted action, yet their combined carelessness in the simultaneous performance of unconnected duties produced a single injury to the plaintiff. It thus becomes impossible to ascertain whether one defendant rather than the other was the efficient cause of the wrong to which each contributed.

The plaintiff, therefore, is entitled to prosecute his suit to final judgment against both defendants, although he can have but one satisfaction in damages. *Oulighan* v. *Butler*, 189 Mass. 287, 293, and cases cited.

The verdict in their favor having been improperly directed, in accordance with the agreement of the parties, judgment is to be entered for the plaintiff in the sum of $600.

So ordered.

Doster, C. J., in CHICAGO, &c., RAILWAY COMPANY *v.* DURAND.

1902. 65 *Kansas*, 380, p. 383.

[The driver of a hack, carrying passengers, negligently drove in front of an approaching train at a crossing. The train, through the fault of its managers, negligently ran into the hack. A passenger in the hack brought an action against the railway company and the hack driver jointly.]

Doster, C. J. That the carrier of the passenger may be under a

greater obligation of prudence and caution than the driver of the train or other vehicle does not change the rule of joint liability. The carrier may be required to use extraordinary care, the other only ordinary care. That, however, does not excuse the latter from using such measure of caution as the law imposes on him. It is no answer for him to say that, while he failed to observe the minor degree of prudence required of him, the other party failed to observe the greater degree required of him. The question of joint liability in such cases cannot be affected by the comparative culpability of the offenders. If the neglect of one to exercise the extraordinary degree of diligence required of him conjoins the neglect of another to use the lesser degree of diligence required of him, to the injury of a third person, such injury is none the less the single result of the two negligent acts or omissions of duty. It is well settled that the law will not undertake to apportion consequences between two or more persons jointly guilty of wrongful conduct toward another, though their contributions to the injury were in unequal degrees or from different motives; and it must be that the same rule applies where the injury was wrought by the neglect of differing degrees of responsibility.[1]

LITTLE SCHUYLKILL NAVIGATION CO. *v.* RICHARDS' ADMINISTRATOR.

1868. 57 *Pennsylvania State*, 142.[2]

ERROR to the Court of Common Pleas of Schuylkill County.

F. B. Gowen and *J. Bannan* (*T. R. Bannan* with them), for plaintiffs in error.

F. W. Hughes (*G. E. Farquhar* and *F. Hoffman* with him), for defendant in error.

AGNEW, J. All the assignments of error, from the 4th to the 11th inclusive, involve substantially the same question, and may be considered together. The plaintiff's intestate was the owner of a dam and water-power upon the Little Schuylkill river. In process of time, from 1851 to 1858, the basin of the dam became filled with the coal-dirt, washed down by the stream from the mines above, of several owners, upon Little Schuylkill, Panther creek, and other tributaries. They were separate collieries, worked independently of each other. The plaintiff seeks to charge the defendants below with the whole injury caused by the filling up of his basin. The substance of the charge and answers to points was, that if at the time the defendants were engaged in throwing the coal-dirt into the river, about ten miles above the dam, the same thing was being done at the other collieries,

[1] Compare ROWELL, C. J., in *Drown* v. *New England Telephone &c., Co.*, 80 Vermont, 1, p. 11. — ED.

[2] Statement and arguments omitted. — ED.

and the defendants knew of this, they were liable for the combined result of all the series of deposits of dirt from the mines above from 1851 till 1858. The aspects of the case were varied, by deposits being made on and along the banks of the streams, which were carried away by ordinary rains and freshets; but the above is the most direct statement of the injury alleged, and is taken therefore as the test of the principle laid down by the Court. The doctrine of the learned judge is somewhat novel, though the case itself is new; but, if correct, is well calculated to alarm all riparian owners, who may find themselves by a slight negligence overwhelmed by others in gigantic ruin.

It is immaterial what may be the nature of their several acts, or how small their share in the ultimate injury. If, instead of coal-dirt, others were felling trees and suffering their tops and branches to float down the stream, finally finding a lodgment in the dam with the coal-dirt, he who threw in the coal-dirt, and he who felled the trees would each be responsible for the acts of the other. In the same manner separate trespassers who should haul their rubbish upon a city lot, and throw it upon the same pile, would each be liable for the whole, if the final result be the only criterion of liability. But the fallacy lies in the assumption that the deposit of the dirt by the stream in the basin is the foundation of liability. It is the immediate cause of the injury, but the ground of action is the negligent act above. The right of action arises upon the act of throwing the dirt into the stream, — this is the tort, while the deposit below is only a consequence. The liability, therefore, began above with the defendant's act upon his own land, and this act was wholly separate, and independent of all concert with others. His tort was several when it was committed, and it is difficult to see how it afterwards became joint, because its consequences united with other consequences. The union of consequences did not increase his injury. If the dirt were deposited mountain high by the stream his dirt filled only its own space, and it was made neither more nor less by the accretions. True, it may be difficult to determine how much dirt came from each colliery, but the relative proportions thrown in by each may form some guide, and a jury in a case of such difficulty, caused by the party himself, would measure the injury of each with a liberal hand. But the difficulty of separating the injury of each from the others would be no reason that one man should be held to be liable for the torts of others without concert. It would be simply to say, because the plaintiff fails to prove the injury one man does him, he may therefore recover from that one all the injury that others do.

This is bad logic and hard law. Without concert of action no joint suit could be brought against the owners of all the collieries, and clearly this must be the test; for if the defendants can be held liable for the acts of all the others, so each and every other owner can be made liable for all the rest, and the action must be joint and several. But the moment we should find them jointly sued, then the want of concert and the several liability of each would be apparent. These prin-

ciples are fully sustained by the following cases: *Russell* v. *Tomlinson et al.*, 2 Conn. 206; *Adams* v. *Hall*, 2 Vermont, 9; *Van Steinberg* v. *Tobias*, 17 Wend. 562; *Buddington* v. *Sherer*, 20 Pickering, 477; *Auchmuty* v. *Ham*, 1 Denio, 495; *Partenheimer* v. *Van Order*, 20 Barb. 479. These were cases where the dogs of several owners united in killing sheep, and where the cattle of different owners broke into an enclosure and united in the damage. The concert and united action of the dogs and cattle were held to create no joint liability of their owners, notwithstanding the difficulty of determining the several injury done by the animals of each. The rule laid down in the last case was that where the owner of the garden could not prove the injury of each cow, the jury would be justified in concluding that each did an equal injury. Several cases were cited in opposition, but do not, in our opinion, support the doctrine of the charge.

In *Stone* v. *Dickinson*, 5 Allen, 29, where an officer made an arrest at the same instant upon nine writs, and the parties were held jointly liable for the trespass, the ground of action was the arrest itself, a single act, incapable of division or separation, but being authorized by all, all were held to have been concerned in the very act, which each authorized the same agent to commit. In *Colgrove* v. *N. Y. and N. H. and N. Y. and Harlem Railroad Companies*, 20 N. Y. Rep. 492 (6 Smith), the two companies were using the same track by joint arrangement governed by common rules, the collision of their trains was owing to mutual and concurring negligence, and the injury, which was single, was therefore their concurrent and direct act. They were held to be jointly liable because of their joint use of the track, their common duty to all travelling the road, and their concurrent negligence in the direct act which caused the injury. The case of the party-wall in this State was put on the same ground. The distinction between that case and this was sharply defined by our Brother Strong. It was there said that the maintenance of an insecure party-wall was a tort in which both participated. The act was single, and it was the occasion of the injury. The case is not to be confounded with actions of trespass brought for separate acts done by two or more defendants. Then if there be no concert, no common intent, there is no joint liability. Here, the keeping of the wall safe was a common duty, and a failure to do so was a common neglect. *Klauder* v. *McGrath*, 11 Casey, 128. In principle, *Bard et al.* v. *Yohn*, 2 Id. 482, more resembles this case. There the effects of the independent acts of the defendants on the opposite sides of the street united in causing the injury, but they were not jointly liable, because there was no concert in the acts themselves.

[Remainder of opinion omitted.]

Judgment reversed. Venire facias de novo awarded.[1]

[1] According to *Warren* v. *Parkhurst*, 186 New York, 45, the various defendants in the Little Schuylkill case might have been joined as co-defendants in an equity suit brought to restrain the further depositing of coal-dirt in the river by the independent acts of each defendant; even though they could not be made co-defendants in an action of tort to recover for damage resulting from such deposits.

See *Norton* v. *Colusa &c., Co.*, 167 Federal Reporter, 202. — ED.

DOWLING, C. J., IN WEST MUNCIE STRAWBOARD COMPANY *v.* SLACK.

1904. 164 *Indiana*, 21, pp. 24 and 25.

DOWLING, C. J. 1. Objection is made by the appellants that the acts alleged [polluting a watercourse], if done at all, were performed severally and independently by them, and hence there can be no joint liability therefor. It is probably true that an action at law for the recovery of money damages, as distinguished from a suit in equity, cannot be maintained jointly against various tort-feasors among whom there is no concert or unity of action and no common design, but whose independent acts unite in their consequences to produce the damage in question. *Miller* v. *Highland Ditch Co.*, (1891) 87 Cal. 430, 25 Pac. 550, 22 Am. St. 254; *Lockwood Co.* v. *Lawrence*, (1885) 77 Me. 297, 52 Am. Rep. 763; *Sloggy* v. *Dilworth*, (1888) 38 Minn. 179, 36 N. W. 451, 8 Am. St. 656; *Martinowsky* v. *City of Hannibal*, (1889) 35 Mo. App. 70; *Chipman* v. *Palmer*, (1879) 77 N. Y. 51, 33 Am. Rep. 566; *Blaisdell* v. *Stephens*, (1879) 14 Nev. 17, 33 Am. Rep. 523; *Long* v. *Swindell*, (1877) 77 N. C. 176; *Little Schuylkill Nav., etc., Co.* v. *Richards*, (1868) 57 Pa. St. 142, 98 Am. Dec. 209; *Draper* v. *Brown*, (1902) 115 Wis. 361, 91 N. W. 1001; *The Debris Case*, (1883) 16 Fed. 25. And see *Sellick* v. *Hall*, (1879) 47 Conn. 260.

2. A distinction, however, is recognized between such acts which are wrongful only because injurious to individual rights, and those which combine and constitute a public nuisance. *Simmons* v. *Everson*, (1891) 124 N. Y. 319, 26 N. E. 911, 21 Am. St. 676; *Irvine* v. *Wood*, (1872) 51 N. Y. 224, 10 Am. Rep. 603; *City of Valparaiso* v. *Moffitt*, (1895) 12 Ind. App. 250, 255, 54 Am. St. 522.

In the former class of cases each separate wrong-doer is chargeable with his own acts alone, in the absence of a joint purpose among the participants; in the latter, each may be answerable in a joint and several action not only for what he himself does, but likewise for the acts of those who, with him, violate public as well as private rights. If a party deliberately places himself in opposition to the entire community by performing an act which, in combination with the independent wrongful acts of others, violates an express statute and creates a public nuisance, he is not in a position to assert that he should be held responsible to individuals specially damaged for only the actual loss he alone has occasioned them. He must have anticipated the natural and probable consequences of his acts, namely, the violation of a public right; and the public interest requires he shall, if need be, even in a civil action, bear the full burden of the wrong he has assisted in inflicting. Nor is it material that his act of itself, and without reference to the coöperation of others, would create a public nuisance. He must be deemed to know, in a case such as the present, that, if his wrong combines with similar acts of third parties, the re-

sult will be to intensify the public and private injury. The welfare of the community demands that he who thus intentionally and aggressively assists either in creating or maintaining a public nuisance in defiance of positive enactments shall answer in civil damages for all injurious consequences proximately resulting therefrom to private individuals who bring themselves within the requirements of the law.

3. There can be no question but that the acts of the appellants constituted a public nuisance (§ 2154 Burns 1901, § 2066 R. S. 1881; *City of Valparaiso* v. *Moffitt, supra*), and hence they could be held jointly and severally liable at the suit of parties specially damaged.

SUMMERS, J., IN CITY OF MANSFIELD *v.* BRISTOR.

1907. 76 *Ohio State*, 270, p. 295.

SUMMERS, J. The distinction suggested in *West Muncie Strawboard Co.* v. *Slack et al.*, 164 Ind. 21, *supra*, has no foundation in precedent and is not believed to be maintainable on principle. The distinction assumes that several torts have been committed but holds the perpetrator of one liable for the damage from all on the sole ground that his act is a public wrong. If I give you a beating to-day, or rather, if you to-day beat me and to-morrow another does likewise, and in consequence I take to my bed, are you liable to me in damages for all of my injuries because your act was unlawful? In *White* v. *Conly*, 14 Lea, 51, the facts are that White and Conly, at a trial before a justice of the peace, engaged in a fight, and while so engaged, White's son, acting in sympathy and in aid of his father, but without his knowledge, cut Conly with a knife, of which wound he died, and the widow of Conly sued both father and son to recover damages. The court charged, in substance, that if the father willingly fought he was engaged in an unlawful act, and that if while so engaged the son inflicted the wound, both were liable, and accordingly a verdict was returned against both, but the Supreme Court overruled *Beets* v. *The State*, Meigs' R. 106 (19 Tenn.), on which the instruction was based, and approves what is said in 1st Bishop's Criminal Law, section 439, that "the true view is doubtless as follows: every man is responsible, criminally, for what of wrong flows directly from his corrupt intentions; but no man, intending wrong, is responsible for an independent act of wrong committed by another."

That an act was a delict, as distinguished from a *quasi* delict, may be a reason for denying contribution among those answerable for it (*Palmer* v. *Wick and Pulteneytown Steam Shipping Co., Ltd.*, 1894, L. R. A. C. 318), but it is not a ground for making one wrong-doer answer for the wrongs of another merely because they result in injury to the same person.

SECTION II.

Whether Damages in an Action against Joint Wrongdoers should be assessed as Entire or Severally.

HILL ET AL. *v.* GOODCHILD.

1771. 5 *Burrows*, 2790.

THIS was a writ of error from the Court of Common Pleas. It was twice argued: first, on Tuesday, 23d April, 1771, by Mr. Morgan for the plaintiff in error, and Mr. Walker for the defendant in error; and again on Tuesday, 4th June, 1771, by Mr. Wallace for the plaintiff in error, and Mr. Dunning for the defendant in error. The roll in C. B. is No. 632. The pleadings were in substance as follows: trespass *vi et armis*, brought in C. B. by Goodchild against Hill and Winsey, for an assault and battery. The defendants plead "Not guilty;" and issue is joined thereupon. The jury find them guilty; and assess damages against Hill (besides costs and charges), to 40*s*., and for costs and charges, 40*s*., and they assess damages against Winsey, to one shilling only. And the judgment is, that the said Charles Goodchild do recover against Hill, the damages aforesaid to four pounds, and also £23 for his costs *de incremento;* in all, £27; and that he do recover against Winsey, the damages aforesaid to one shilling, and also one shilling for his costs; in all, two shillings.

The defendants brought a writ of error: and several errors were assigned; and particularly, that the jury had given damages against the defendants severally and distinctly for one joint trespass; whereas the damages ought to have been joint, and not several. And the Court have given judgment against them to recover several and distinct damages for one joint trespass.

Many cases were cited on both sides. For the plaintiff in error, Cro. Eliz. 860; *Austin* v. *Willward and two others*, Cro. Jac. 384; *Matthews and his Wife* v. *Cole and others*, Cro. Jac. 118; *Crane & Hill* v. *Hummerstone*, 3 Lev. 324; *Smithson* v. *Garth and others*, Carthew, 19, 20; *Rodney* v. *Strode et al.*, 3 Mod. 101 S. C.; 1 Stra. 422; *Onslow* v. *Orchard*, 2 Stra. 910; *Lowfield* v. *Bancroft et al.*, 11 Rep. 5; *Sir John Heydon's case*, 5th resolution, fo. 7; Cro. Car. 193; *Johns & Robinson* v. *Dodsworth*, 1 Wilson, 30; *Sabin* v. *Long*, Co. Lit. 232; Hob. 66, and 9 Co. 79 b. For the defendant in error, 1 Bulstrode, 157; *Sampson* v. *Cranfield and Upton*, in point; and the reason given, "Because the battery of the one can't be the battery of the other; and the battery of the one may be greater than the battery of the other," 2 Stra. 1140; *Chapman* v. *House*, *Slater*, *& Goodacre*, Jenkins's Centuries, 317, pl. 10; *Lane* v. *Santloe*, 1 Stra. 79, which case showed, they said, that *Sir John Heydon's case* was not considered by Lord

Ch. J. King as an authority. And they called it a confused case, and of doubtful authority. It was replied by the counsel for the plaintiff in error, in answer to this treatment of *Sir John Heydon's case*, that there has been no subsequent determination in contradiction to it; that the case of *Player* v. *Warn and Dewes*, in Cro. Car. 54, 55, mentions it without disapprobation of it; and that it seems to be adopted by the Court in the case reported by Serjeant Wilson.

The Court observed, that there was a very great confusion in the cases upon this subject, which ought to be carefully looked into, and settled. Some of them are diametrically opposite. And Mr. Justice Aston added, that some of them were determined upon principles not agreeable to his understanding. Lord Mansfield observed, that in fact all the defendants may be guilty; and yet the degrees of their guilt may be different; but the present question is whether upon a charge of a *joint* trespass, the jury can assess damages according to different degrees of guilt; though the real justice is, that the damages should be respectively assessed in proportion to the real injury done by each defendant. This is a question that is of general experience, and concerns all the courts in Westminster-hall. It is a strange thing that a matter which happens every day should be attended with such difficulties. Neither side of the determination will reconcile the cases. However, we will consider of it.

Cur. advis.

And now Lord Mansfield delivered their opinion.

We hold that, as the trespass is *jointly* charged upon both defendants, and the verdict has found them both *jointly guilty*, the jury could not afterwards assess several damages. His lordship particularly mentioned the cases of *Austen* v. *Wilward;* the 5th resolution in *Sir John Heydon's case;* the case in Cro. Jac. 118; of *Crane and Hill* v. *Hummerstone;* the case of *Rodney* v. *Strode*, in Carthew 19, and Jenkins's Centuries, 317, pl. 10, as warranting this opinion.

We do not think that the present case calls for an opinion upon those cases where the defendants are charged jointly and severally; or where the defendants plead severally; or where the defendants are found guilty of several parts of the same trespass or at a different time; or where a joint action is brought for two several trespasses, and the damages found severally, as being severally guilty. We don't meddle with any of these cases: there is a variety of opinions in the books relating to them. It is enough for us to found our present determination upon the present case. And the present case is, that the count is of a *joint* trespass; and the jury have found the defendants guilty of a *joint* trespass, and yet have severed the damages. We are of opinion that, in such case, the damages can't be severed.

The consequence is, that the judgment must be reversed.

Judgment reversed.

HALSEY *v.* WOODRUFF.

1830. 9 *Pickering*, 555.

TRESPASS against Halsey and Avery for entering Woodruff's close and pulling down a blacksmith's shop; with counts for carrying away the materials.

The defendants plead severally the general issue.

The jury find "that the said Avery is guilty in manner and form as the plaintiff has alleged, and assess damages against said Avery at two dollars, and the jury also find that said Halsey is guilty in manner, &c., and assess damages against said Halsey at seventy-five dollars."

The plaintiff elected to take judgment against both defendants for the greater damages, and entered a *remittitur* as to the lesser damages.

The defendants sued out a writ of error, assigning for error, that although the jury which tried the cause returned a separate verdict of seventy-five dollars against Halsey and also a separate verdict of two dollars against Avery, the Court rendered a judgment against both for the sum of seventy-five dollars and costs.

Dwight and *Bishop*, for the plaintiffs in error, cited *Kempton* v. *Cook*, 4 Pick. 307; *Kennebeck Purchase* v. *Boulton*, 4 Mass. R. 419; *Livingston* v. *Bishop*, 1 Johns. R. 290; *Heydon's case*, 11 Co. 5.

Porter, *contra*, cited Bac. Abr. *Damages*, *D.* 4; *Rodney* v. *Strode*, Carth. 19; *Mitchell* v. *Milbank*, 6 T. R. 199; 2 Tidd's Pr. 805; *Hill* v. *Goodchild*, 5 Burr. 2790; *Brown* v. *Allen*, 4 Esp. R. 158.

PER CURIAM. We think the judgment was rightly entered. The result of the authorities, which are numerous, is, that where a joint action is brought against two for a trespass done, and there is a judgment against both, it must be a judgment for joint damages. All the legal consequences of there being a joint judgment must necessarily follow; one of which is, that each is liable for all the damage which the plaintiff has sustained by such trespass, without regard to different degrees or shades of guilt. *Heydon's case* cites many of the authorities, the effect of which is given in Tidd, that where the action is brought against several defendants and the jury assess several damages, the plaintiff may enter a *remittitur* as to the lesser damages and take judgment against all who are guilty of the joint trespass, for the greater damages. And this is founded on a sufficient reason. Each defendant is liable for the whole damages of a joint trespass. A release to one discharges both, and the reason is, that the damage is joint. The plaintiff here alleges a joint trespass. The defendants plead severally, that they are not guilty — of what? of the joint trespass; and they are found guilty — of what? of the same joint trespass Damages are assessed against one at seventy-five dollars; this therefore, by the finding of the jury, is the damage which the plaintiff has sustained, and the law

draws the inference that both are liable for that sum. The inquiry of damages, though made by the same jury, when an issue in fact is tried, is in some degree collateral to the trial of the issue. Where there is judgment on an issue of law alone, there must necessarily be a distinct inquiry of damages, and then the question for the jury is only what damages has the plaintiff sustained, by reason of the trespass done, without regard to the particular acts done by either of the defendants. So where the damages are found by the jury, on an issue in fact, the sole inquiry open to them is, what damages the plaintiff has sustained, not who ought to pay them; and therefore their finding of separate damages is beyond their authority and merely void. Suppose in an action against two for a joint trespass, one of the defendants demurs to the declaration, and the declaration is sustained, and the other pleads the general issue, which is found against him and damages are assessed; judgment would be rendered that both were guilty, and execution would issue against both for the damages so found by the jury. On principle, as well as authority, the judgment entered in the case before us was correct.

Judgment affirmed.

SECTION III.

Liability Joint and Several.

RICH *v.* PILKINGTON, LORD MAYOR OF LONDON.

2 *&* 3 *William & Mary. Carthew*, 171.

Action on the case for a false return of a mandamus, in which action the plaintiff declared that he was lawfully elected into the office of Chamberlain of London, and that the defendant refused to admit him into that office; whereupon he brought a mandamus directed to the defendant, and the aldermen, &c., and the defendant returned that the plaintiff *nunquam fuit electus* to the said office, *ubi revera* he was lawfully elected by the majority, &c.

The defendant pleaded, in abatement, that the mayor and aldermen of London are a corporation, and that all of them in their judicial capacity in a Court of Aldermen jointly made the said return; and thereupon prayed judgment of the bill brought against the mayor alone.

And upon a demurrer to this plea, it was adjudged ill, for this action is founded on a tort, and therefore it may be either joint or several, at the election of the party, as in trespass, &c.

But it was objected, that the mandamus was directed to all, viz., to the mayor and aldermen, &c., and therefore it would be injurious to the mayor, for it might be that he voted for the plaintiff against the return, and was overruled by the majority to make this return.

To which it was answered, and so resolved by the Court, that the mayor and aldermen are not a corporation, but they are a court, which is nothing to this purpose.

And as to the other matter, if the fact is so, that the defendant was overruled by the majority, and contrary to his will, this would have been evidence upon not guilty pleaded, and being proved, the plaintiff would have been nonsuit.

[Remainder of opinion omitted.]

MITCHELL *v.* TARBUTT ET ALS.

1794. 5 *Term Reports* (*Durnford & East*), 649.[1]

THIS was an action on the case for negligence, wherein the declaration stated, That whereas one J. Jones and one G. Bolland, at the time of committing the grievance thereinafter mentioned, were possessed of a certain ship called the Albion, which was then proceeding on a voyage from Jamaica to Bristol, and that there were then on board the said ship 600 hds. of sugar belonging to the plaintiff; and that whereas the said G. Tarbutt, N. A., J. H., D. T., and J. E. (the defendants), were at the time when, &c., possessed of a ship called the Amity Hall, whereof one G. Young was then master, then also sailing on the high seas, and the said G. Young, their servant in that behalf, then and there had the management of the said ship Amity Hall; yet that the defendants, by their said servant, so negligently navigated their ship, that the said ship, by the negligence of their servant, with great force struck against the said ship of Jones and Bolland, then sailing with the plaintiff's goods on board, and so damaged the goods that they were wholly lost to the plaintiff. To this the defendants pleaded in abatement, that the grievance (if any) was committed by the defendants, and one A. Shakespear, C. Bryan, S. Orr, and J. Neuffville, jointly, and not by the defendants only. To which there was a general demurrer, and joinder.

Giles, in support of the demurrer, was stopped by the Court.

Wood, contra.

LORD KENYON, C. J. With regard to the last case cited, there certainly is a distinction in the books between cases respecting real property and personal actions: where there is any dispute about the title to land, all the parties must be brought before the Court. But upon this question it is impossible to raise a doubt. I have seen the case of *Boson* v. *Sandford*, in the different books in which it is reported, in all of which this doctrine is clearly established, that if the cause of action arise *ex contractu*, the plaintiff must sue all the contracting parties; but where it arises *ex delicto*, the plaintiff may sue all or any of the parties, upon each of whom individually a separate trespass attaches. The case of *Boson* v. *Sandford* was treated by the whole Court as an action for a breach of contract; there indeed it was also determined that the defendant might take advantage of the objection, that all the contracting parties were not sued, on the plea of *non assumpsit;* but that being found inconvenient, a contrary doctrine has been since established.[2] But this being an action *ex delicto*, the trespass is several; and it is immaterial whether the tort were committed by the

[1] Argument omitted. — ED.

[2] *Vide Rice* v. *Shute*, 5 Burr. 2611; *Abbot* v. *Smith*, id. 2614, 5; and *Germaine* v. *Frederic*, Tr. 25 Geo. 3, B. R.

defendant or his servant, because the rule applies *qui facit per alium, facit per se.*

GROSE, J. The same distinction between the actions of tort and assumpsit was also laid down in *Child* v. *Sand*, Carth. 294.

LAWRENCE, J. In Carth. 171, it was held that an action for a false return to a mandamus was founded on a tort, and that "therefore it might be either joint or several, at the election of the party, as in trespass," &c. *Judgment for the plaintiff.*[1]

McAVOY *v.* WRIGHT ET ALS.
McAVOY *v.* DREW.

1884. 137 *Massachusetts*, 207.[2]

Two actions of tort for the conversion of a horse, wagon, and other articles of personal property. The cases were tried together.

It appeared that the defendant Drew, who was a constable, attached the property in question upon a writ in favor of the firm of Wright Brothers & James, the other defendants, and against one Frank J. Dempsey. Drew testified that he was instructed by the attorney of Wright Brothers & James to attach the property in question. Plaintiff offered evidence tending to show that said property was sold and delivered to him by Dempsey prior to the attachment.

The defendants requested the judge to rule that the two actions could not be simultaneously maintained. The judge declined so to rule; and ruled that both actions might be maintained and prosecuted to final judgment; and that, if the jury found for the plaintiff in both cases, they should assess the damages at the same sum in each case.

The jury returned a verdict for the plaintiff in each case, and assessed damages in the sum of $462.95. Defendants excepted.

E. C. Gilman, for defendants.

J. A. McGeough, for plaintiff.

HOLMES, J. [After deciding other points.] The other exceptions are not pressed, and seem to be waived. Where there is a joint conversion like this, the plaintiff has his election to sue all or some of the tort-feasors jointly; *Mitchell* v. *Tarbutt*, 5 Term Rep. 649; 1 Wms. Saunders, 291, n. 4; 1 Chit. pl. (7th ed. by Greening) 97; and, at the same time, may maintain another action against one of them separately. *Elliott* v. *Hayden*, 104 Mass. 180.

[Omitting remainder of opinion.] *Exceptions overruled.*

1 *Vide* Bristow *v.* James, 7 Term Rep. 257.

2 Only so much of the case is given as relates to a single point. — ED.

ATLANTIC & PACIFIC RAILROAD v. LAIRD.

1896. 164 *United States*, 393.[1]

ACTION against the Atlantic & Pacific Railroad Company and the Atchison, Topeka & Santa Fe Railroad Company. The complaint alleged that the two defendant corporations jointly owned and operated a certain line of railroad; that on November 3, 1890, plaintiff, a passenger on said railroad, was hurt by the derailment of a train; and that the derailment occurred by reason of the negligence of the defendants. Answers were filed, denying that the defendants were jointly guilty of the alleged negligence or that they jointly operated the line of railroad, but admitting that the Atlantic & Pacific Railroad Company was operating it. On the first trial, the plaintiff was allowed to amend her complaint. To the cause of action stated in the complaint as thus amended, the defendants pleaded a statute of limitations for two years.

On February 7, 1893, before a second trial, a second amended complaint was filed, in which the Atlantic & Pacific Railroad Company was charged to have owned and operated the line of railroad in question, and to have done the negligent acts averred in the original complaint. An attack upon this pleading was made in the trial court by motion to strike from the files, by demurrer, by motion for judgment upon the pleadings, and by special requests for directions to the jury upon the second trial of the case. The ground of all such attacks was that the pleading set up a new cause of action, against which the statute of limitations had run at the time of the filing of such pleading. The cause was tried for the second time in April, 1893, and a verdict was again rendered against the Atlantic & Pacific Railroad Company. A judgment upon such verdict was subsequently affirmed by the Circuit Court of Appeals. 15 U. S. App. 248. By writ of error such judgment of affirmance was brought to this court for review.

Mr. A. T. Britton, *Mr. A. B. Browne* and *Mr. C. N. Sterry*, for plaintiff in error.

Mr. George H. Smith, *Mr. Frank H. Short* and *Mr. Edwin A. Meserve*, for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

It is not controverted that under section 339 of the Code of Civil Procedure of California a cause of action of the character of that set forth in the various complaints filed on behalf of plaintiff was required to be instituted within two years after the cause of action accrued.

The question to be determined, therefore, is whether the trial court erred in holding that the amendments effected by the second

[1] Statement abridged. Only part of the opinion is given. — ED.

amended complaint did not set up a new cause of action; for, if the second amended complaint stated a distinct and independent cause of action, the bar of the statute should have been allowed to prevail. *Union Pacific Railway Company* v. *Wiley*, 158 U. S. 285.

. . . . . .

So, in the case at bar, there was a duty shown, independently of contract; and the trial court, looking at the allegations of a complaint which had not been demurred to, solely for the purpose of determining the propriety of an amendment, was manifestly justified in holding that the right to recover was not founded upon the breach of a contract, but upon the neglect of a common law duty. The action therefore was *ex delicto*, and the defendants, being joint tort feasors, might have been sued either separately or jointly, at the election of the injured party, and if, upon the trial, the proof warranted, a recovery might have been had against a single defendant. *Sessions* v. *Johnson*, 95 U. S. 347.

The right of recovery against one of several joint tort feasors thus existing is in principle analogous to the rule declared by Chitty at page 386 of his work on pleading, to the effect that in torts the plaintiff may prove a part of the charge if the averment be divisible and there be enough proof to support his case. This is illustrated at page 392, where Chitty says: —

"In an action *ex delicto*, upon proof of part only of the injury charged, or of one of several injuries laid in the same count, the plaintiff will be entitled to recover *pro tanto*, provided the part which is proved afford *per se* a sufficient cause of action, for torts are, generally speaking, divisible."

As, therefore, in an action against joint tort feasors recovery may be had against one, it follows that allegations alleging a joint relationship and the doing of negligent acts jointly are divisible, and that a recovery may be had where the proof establishes the connection of but one of the defendants with the acts averred. The case also comes within the principle of the rule alluded to by Chitty, Ib. 393, that "a general averment, including several particulars, may be considered *reddendo singula singulis*." He instances the case of a declaration for a false return to a *fi. fa.* against the goods of A and B, wherein it was alleged that A and B had goods within the bailiwick, and it was held to be sufficient to prove that either of them had, the averment being severable.

. . . . . .

It results that if the nature of the action was not changed, the amendment merely dismissing one of two joint tort feasors and alleging that the injury complained of was occasioned solely by the remaining defendant did not introduce a new cause of action.

. . . . . .

Judgment affirmed.

LOW *v.* MUMFORD AND MUMFORD.

1817. 14 *Johnson*, 426.

IN ERROR, on *certiorari* to a Justice's Court.

The plaintiff in error brought an action in the Court below, against the defendant in error, "for keeping up a mill-dam on the Susquehannah River, below the lands of the plaintiff, whereby the water of the river was set back, and flowed the plaintiff's land," &c. The defendants pleaded in abatement, that the land on which the mill-dam was erected, and the mills appurtenant thereto, were held in joint tenancy by the defendants, together with several other persons (naming them), who were not made parties to the suit. The plaintiff objected to the sufficiency of the plea, but the justice gave judgment for the defendants.

PLATT, J., delivered the opinion of the Court. The general rule on this subject is, that if several persons jointly commit a tort, the plaintiff has his election to sue all, or any of them, because a tort is, in its nature, a separate act of each individual, and, therefore, in actions, in form *ex delicto*, such as trespass, trover, or case for malfeasance, against one only, for a tort committed by several, he cannot plead the nonjoinder of the others, in abatement or in bar. 1 Chitty's Plead. 75. There is a distinction, however, in some cases between mere personal actions of tort, and such as concern real property. 1 Chitty's Plead. 76. In the case of *Mitchell* v. *Tarbutt*, 5 Term Rep. 65, Lord Kenyon recognizes this distinction, and says, "where there is any dispute about the title to land, all the parties must be brought before the Court." A case in the Year Books, 7 Hen. IV. 8, shows that a plea in abatement may be well pleaded for this cause, to an action on the case, for a tort. An action of trespass on the case was brought against the Abbot of Stratford, and the plaintiff counted that the defendant held certain land, by reason whereof he ought to repair a wall on the bank of the Thames; that the plaintiff had lands adjoining, and that for default of repairing the wall, his meadows were drowned. To which Skrene said, "It may be that the abbot had nothing in the land, by cause whereof he should be charged, but jointly with others, in which case the one cannot answer without the other."

But in actions for torts relating to lands of the defendants, there seems to be ground for this further distinction, viz. between nuisances arising from acts of malfeasance, and those which arise from mere omission, or nonfeasance. The case of the Abbot of Stratford was that of a nuisance, arising from neglect of duty in not repairing a wall, which was by law enjoined on the proprietor or proprietors of the land on which the wall stood. The gist of the action, therefore, was, that the defendant was such proprietor, and had neglected a duty incident to his title. The title to the land on which the nuisance existed was, therefore, directly in question; for if the abbot was not the owner

of the land, he was not chargeable with neglect, nor liable for the nuisance. But in this case, the action is for a nuisance arising from an act of misfeasance, the "keeping up a mill-dam on a stream below the plaintiff's land." Here needs no averment that the defendant owned the land on which the dam was kept up. The title to that land cannot come in question in this suit, for the maintaining such a dam is equally a nuisance, and the defendants are equally liable for damages, whether the defendants own the land as joint tenants with others, or whether they are sole proprietors, or whether they have any right whatever in it. "Keeping up" the dam implies a positive act of the defendants: it is a malfeasance, and therefore, the plaintiff has a right of action against all or any of the parties who keep up that dam. Unless the title comes in question, there is no difference, in this respect, in cases arising *ex delicto*, between actions merely personal, and those which concern the realty. The plaintiff, in such an action, is always bound to join his co-tenants, because his title must come in question as the foundation of his claim; but he may sue any or all who have done the tortious act. The justice, therefore, erred in deciding against the demurrer to the plea in abatement, and the judgment must be reversed.

Judgment reversed.

SECTION IV

Effect of Release of One of the Joint Wrong-doers. Effect of Agreement not to Sue One. Effect of Payment received from One.

COCKE *v.* JENNOR.

James I. Hobart, 66, *pl.* 69.

THOMAS COCKE brought an action of trespass against Kenelme Jennor for breaking his house, at Dunmow, and beating him, the last day of October, in the tenth year of the king. The defendant pleads that he, together with one Robert Milborne, in the time of the trespass supposed, did jointly break the plaintiff's house and beat him, and that afterwards, on the thirteenth day of June, 11 Jac. R., the plaintiff did release unto the said Milborne by his writing, which the defendant shows in Court, all actions, real and personal, &c., and avers that the trespass whereof the plaintiff complains, and which he and Milborne did jointly, *est una et eadem, et non alia neque diversa.* Whereupon the plaintiff demurred, and it was adjudged for the defendant; for though a trespass be joint and several to this purpose, that he may sue either one or all, yet when two join in a trespass, they so make one trespasser, as either of them is as well answerable for his fellow's fact as for himself. And therefore a release to one dischargeth the whole trespass; and also a release is as good a satisfaction in law as a satisfaction in deed; and therefore if an executor release, the debt released is judged assets in his hand. Now against joint trespassers, there can be but one satisfaction, and therefore if they be sued in one action, though they may sever in pleas and issues, yet one jury shall assess damages for all; and as to the damages, he that is no party to the issue shall have an attaint as well as his fellows; and if they be sued in several actions, though the plaintiff make choice of the best damage, yet, when he hath taken one satisfaction, he can take no more, and, if he require two, an *audita querela* will lie.[1]

[1] "A release of one of several joint tort feasors will discharge all, but to effect this result the instrument must be a technical release under seal. (*Irvine* v. *Millbank*, 56 N. Y. 635; *Morgan* v. *Smith*, 70 N. Y. 537.) The appellant contends that the plaintiff could not do indirectly what he could not do directly. The reverse of this proposition is true. The plaintiff may practically discharge one of several joint tort feasors without losing his claim against the others, if he does it in the right way. (*Miller* v. *Fenton*, 11 Paige, 18, *Pond* v. *Williams*, 1 Gray, 630.) The rule that a release under seal conclusively establishes satisfaction of the claim is entirely technical, and technicality has been employed to avoid the effect of the rule; hence, we have covenants not to sue, etc., which do not operate as releases except in favor of the party to whom they are given."

CULLEN, J., in *Schramm* v. *Brooklyn etc. R. R. Co.*, 35 N. Y. App. Div. 334, p. 336.—ED.

RUBLE *v.* TURNER.

1808. 2 *Hening & Munford (Virginia)*, 38.[1]

James Turner, Joel Motley, and three other persons having committed a joint assault and battery on Thomas W. Ruble, a writing was executed by the latter to the said Motley only, on the 30th of October, 1799, in the following words: "I do hereby acknowledge, that Joel Motley's paying my expenses at Mount Relief with Captain Alexander Hunter shall be satisfaction for the part he the said Motley took in an assault and battery committed upon me at said Mount. Provided this shall not be considered as any satisfaction in favour of Joseph Nunn, Stephen Maynor, James Turner, or Archibald M'Nanny, who were guilty of the same at the same time and place.

"Alex. Hunter. "Tho. W. Ruble.
"Patty Hunter. "Oct. 30, 1799."

On the 22d of April, 1801, Ruble brought a joint action of assault and battery against all the five trespassers in the District Court of Franklin; but the process appears to have been served on James Turner, Joseph Nunn and Stephen Maynor only; who pleaded not guilty and *son assault demesne;* and issues were thereupon joined. At the trial, the plaintiff and those defendants agreed, that the paper, of which the above is a copy, "should be used, in the same manner, on the issues made up in the cause, as if the same had been regularly pleaded"; whereupon the defendants by their counsel moved the court to instruct the jury, "that the said paper discharged the whole of the defendants from the action of the plaintiff, it being for the same cause stated in the paper aforesaid"; which the court accordingly did; to which opinion of the court the plaintiff filed a bill of exceptions; and (a verdict and judgment having been entered against him), obtained a writ of *supersedeas* from one of the judges of this court.

Hay, for plaintiff in error.

Call, for defendants in error.

Tucker, J. . . . The agreement between the parties, that this paper should be used as if it had been pleaded, admits it to have been pleaded properly, so as that an issue on the merits might have been fairly joined upon it; and, consequently, waives all such objections as might have been made by a demurrer. The proper plea (the paper not being under seal) would have been accord and satisfaction, which is a good plea in trespass, and in all actions which suppose a wrong *vi et armis.*

. . . . . .

The next question is, whether an accord with, and satisfaction received from, one joint trespasser, will, like a release, operate as a bar to a recovery against the other joint trespassers.

As every deed, in order to render it effectual, must be founded either

[1] Arguments and part of opinions omitted. — Ed.

upon a good, or a valuable consideration, the reason why a release operates as a bar to an action for an injury done, is the consideration, either good in law, or valuable, which moves to the release. This is the essence of the deed, without which it would be void. So an accord, without satisfaction, which is analogous to the consideration in a deed, would be merely void; but, when satisfaction is made, like a valuable consideration in a deed, it gives effect to the instrument; and (by analogy to a release) satisfaction (which implies full reparation for the injury sustained) being received from one of the joint trespassers, shall discharge the whole.

. . . . . .

But it is contended, that the proviso, that it should not be considered as a satisfaction in favor of the other defendants, makes a distinction between this and the case of an accord and satisfaction generally, and therefore no bar to a recovery against them.

It is a rule of construction that, if there be any clause or condition in a deed, which is either contrary to law, or repugnant to the nature of the estate created, it is void.[1] Now here the question is, whether, by the first clause in this instrument of writing, Joel Motley was thereby discharged, and the plaintiff barred of his action against him: and I hold that he was, for the reasons already given. What then is the effect of this? The law says, that if one joint trespasser be released, or make accord and satisfaction, it shall bar a recovery against all the others. The plaintiff can no more change the law, in this particular, by any subsequent proviso or condition, than he could, after a grant in fee-simple, by deed, restrain his grantee from selling the lands, or change the course of descents prescribed by law; neither of which will it be contended that he could do. The proviso then is merely void, and cannot prevent the legal effect of the accord and satisfaction made by one of the defendants.

I am therefore of opinion, that the judgment be affirmed.

[The concurring opinions of ROANE, J., and FLEMING, J., are omitted.]

Judgment affirmed.

CAREY *v.* BILBY.

1904. 63 *United States Circuit Court of Appeals*, 361.[2]

ERROR to the United States Circuit Court for the District of Nebraska.

Two actions by Bilby *et al.* against Carey to recover damages sustained in consequence of being induced by Carey, through false representations, to purchase cattle from him. The complaint stated, *inter alia*, that Carey and C. J. Hysham owned the cattle which they had

[1] 2 Bl. Com. 155.

[2] Statement abridged from opinion. — ED.

purchased of Comer Bros.; that they, by means of false representations, sold the cattle to Bilby; and that Bilby incurred a large loss by reason of the false representations; viz. $15,840 in the first case, and $4580 in the second case. The complaint admitted that plaintiffs had been paid by C. J. Hysham on account of the damages claimed in the first case the sum of $2229; and on account of the damages claimed in the second case the sum of $771; leaving a balance of damages due plaintiffs in the first case of $13,611 and in the second case a balance of $3809.

Defendant's answer alleged that the sums paid plaintiffs by Hysham were received and accepted by plaintiffs in full release, satisfaction, and discharge of the pretended causes of action sued upon, and in full release of Hysham from all liability thereon.

On the trial the receipt signed by plaintiffs upon the payment by Hysham was introduced in evidence.

After reciting the plaintiffs' claims and the grounds thereof, the receipt proceeds as follows: —

"Now, therefore, in consideration of the sum of $3000, to me in hand paid by T. J. Hysham and C. J. Hysham, and the further consideration of the said T. J. Hysham and C. J. Hysham having assigned to me all claims and causes of action that they, or either of them have against the said Comer Bros., growing out of or in any way connected with the said purchase of said cattle from said Comer Bros., I, J. S. Bilby, fully release and discharge him, the said T. J. Hysham and the said C. J. Hysham, from any and all liability by reason of each, all, and every of the foregoing matters and things, and release him, the said T. J. Hysham and the said C. J. Hysham from any and all liability in any way connected with or growing out of the aforesaid matters. And I will indemnify, protect, and save harmless the said T. J. Hysham and the said C. J. Hysham from paying any further sum to any person or persons whatsoever, on account of any or all the matters set forth in this contract.

"But it is expressly and specifically understood in the execution and delivery of this paper that I do not relinquish or release any action or causes of action that I may now or hereafter have against him, the said J. L. Carey, or them, the said Comer Bros., or either of them by reason of any of the matters or things hereinbefore recited, expressly and specifically reserve to myself the right to maintain in said action or actions against him, the said J. L. Carey, or them, the said Comer Bros., or either or all of them by reason of said matters and things or any of them that I now have or may hereafter have.

"Signed this second day of August, 1898. JOHN S. BILBY."

The trial below resulted in a verdict in favor of the plaintiffs in case No. 1929 for the sum of $2229 and in a verdict in favor of the plaintiffs in case No. 1930 for the sum of $771, on which verdicts judgments were subsequently entered. The defendant below has brought the cases to this court on writs of error.

John C. Cowin, for plaintiff in error.

James W. Hamilton (*H. E. Maxwell*, on the brief), for defendants in error.

Before SANBORN, THAYER, and HOOK, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

At the conclusion of the evidence on the trial below, counsel for the defendant requested a peremptory instruction to find a verdict in favor of his client. This instruction was asked, as it seems, on the sole ground that the release which had been executed by the plaintiff Bilby in favor of T. J. Hysham and C. J. Hysham operated as a release of the defendant, Carey, although it was not so intended, and that no action could be maintained against him in consequence of the execution of this instrument. The trial court denied the request, holding that the release in question did not have the effect claimed for it. It is conceded by counsel for the plaintiff in error that the only question for determination by this court is whether the trial judge was right in his view that the release did not operate as a discharge of the cause of action against Carey.

It is an old and well-established rule of law that the release of a cause of action as against one of two or more joint tort feasors or joint obligors operates as a release of all. This is upon the theory that when one has received full compensation for a wrong, no matter from which wrong-doer or from what source, the law will not permit him to recover further damages. *Lovejoy* v. *Murray*, 3 Wall. 1, 17, 18 L. Ed. 129. When a release of a cause of action for a tort is given by the injured party to one of two or more persons who committed the wrong, the release is construed most strongly against the party executing it. The law indulges in the presumption that the release was given in full satisfaction for the injury, and upon a sufficient consideration, and will not permit the presumption to be overcome by oral proof to the contrary. *Ellis* v. *Esson*, 50 Wis. 138, 6 N. W. 518, 520, 36 Am. Rep. 830; *Bronson* v. *Fitzhugh*, 1 Hill, 185, 186. Sometimes, however, as in the case in hand, a release executed in favor of one wrong-doer is accompanied with the reservation of the right to sue others who were jointly concerned in the wrong, and in such cases the question has frequently arisen, how shall such an instrument be interpreted? Shall the reservation of the right to sue others be ignored, and the instrument treated as raising a conclusive presumption that full compensation for the wrong has been made, as though it were a technical release under seal, or shall the reservation of the right to sue others be taken to mean that full compensation has not been received by the injured party, and that he merely intended to agree with the released party not to pursue him further, but without releasing his cause of action against the other wrong-doers, or admitting that he has received full compensation for the injury? With reference to this question the authorities are not in accord. Some courts are disposed to hold, and

have held, that when such an instrument contains apt words releasing one of the joint wrong-doers, it operates to release all, and that any clause inserted therein reserving a right to sue others after one has been released is repugnant to the release, in that it defeats, or attempts to defeat, the natural legal effect of the instrument; and that it should therefore be ignored. *McBride* v. *Scott et al.* (Mich.), 93 N. W. 243, 61 L. R. A. 445; *Abb* v. *Northern Pacific Ry. Co.* (Wash.), 68 Pac. 954, 58 L. R. A. 293, and cases there cited. Other courts hold, however, that such an instrument should be given effect according to the obvious intent of the person executing it, and that it should not be treated as a technical release operating to destroy his cause of action as against all of the joint tort feasors, but rather as a covenant not to sue the party in whose favor the instrument runs. *Gilbert* v. *Finch*, (N. Y.) 66 N. E. 133, 61 L. R. A. 807; *Matthews* v. *Chicopee Mfg. Co.*, 3 Rob. 712; *Ellis* v. *Esson*, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830; *Hood* v. *Hayward*, 124 N. Y. 1, 16, 26 N. E. 331; *Sloan* v. *Herrick*, 49 Vt. 327; *McCrillis* v. *Hawes*, 38 Me. 566; *Miller* v. *Beck*, (Iowa) 79 N. W. 344, 345; *Price* v. *Barker*, 4 El. & Bl. 760, 776, 777.

We are of opinion that the doctrine enunciated in the cases last cited is supported by the greater weight of authority, and is founded upon the better reasons. It has the merit of giving effect to the intention of the party who executes such an instrument, which should always be done when the intention is manifest and it can be given effect without violating any rule of law, morals, or public policy. Besides, we are not aware of any sufficient reason which should preclude a person who has sustained an injury through the wrongful act of several persons from agreeing with one of the wrong-doers, who desires to avoid litigation, to accept such sum by way of partial compensation for the injury as he may be willing to pay, and to discharge him from further liability without releasing his cause of action as against the other wrong-doers. The law favors compromises generally, and it is not perceived that an arrangement of the kind last mentioned should be regarded with disfavor. The release which was read in evidence in the case at bar plainly shows that the sum paid by Hysham was not accepted by the plaintiffs as full compensation for the injury which they had sustained; that it was not in fact full compensation for the injury; and that they had no intention of releasing their cause of action as against Carey. Why, then, should it be given an effect contrary to the intent of the one who executed it? We perceive no adequate reason for giving it such effect, and accordingly agree with the lower court that it did not release Carey.

The judgments below are therefore affirmed.

SNOW *v.* CHANDLER.

1839. 10 *New Hampshire*, 92.[1]

This was trespass, for assaulting and beating the plaintiff on the 4th day of September, 1838.

The case was tried on the general issue, and a brief statement filed, alleging that the trespass, if any, was committed by the defendant and one George Holt; and that the plaintiff received and accepted of said Holt the sum of twenty dollars, in full satisfaction of said trespass.

The trespass alleged was proved. The defendant, in support of his brief statement, proved that a few days after the occurrence, the mother of said Holt, he being a minor, applied to one White to procure a settlement with the plaintiff for the injury he had received — that White went to the plaintiff and his father, for the purpose, and after some conversation between them on the subject, the plaintiff and his father refused to settle, except upon the conditions and to the extent following, to wit: — That he, White, might leave with them twenty dollars, and in case they should think proper, at any future time, to prosecute Holt, they should be at liberty to do it on refunding the sum so paid: — to which the said White agreed, and the money was paid accordingly. It also appeared that before and at the time of receiving the money, the plaintiff and his father declared they would not settle with Chandler for five hundred dollars.

It was admitted that the twenty dollars had never been refunded.

The counsel for the defendant requested the court to instruct the jury, that the payment of the twenty dollars was a bar to any suit against Holt for the assault, until said twenty dollars was refunded, and that if the plaintiff is barred from a suit against Holt, he cannot, so long as that bar exists, maintain an action against Chandler, he being a joint trespasser; but the court declined thus to charge the jury, but instructed them that the twenty dollars so paid and received as aforesaid was not a bar to this action, but must be considered in part payment of the damage sustained by the plaintiff by said assault and battery; and that, should they find the plaintiff entitled to a larger sum, they would render a verdict for the balance; but in case they should find the twenty dollars an adequate compensation for the injury the plaintiff sustained, they would find a verdict for the defendant.

The jury returned a verdict in favor of the plaintiff, for eighty dollars. The defendant excepted to the ruling of the court, and moved for a new trial.

Mead, for the plaintiff.

Chamberlain & Vose, for the defendant.

Upham, J. In this case the strongest ground on which the de-

[1] Part of opinion omitted. — Ed.

fendant can place his defence is, that the contract with Holt, by which the twenty dollars was received, was a covenant not to sue *him;* and it is argued that if this agreement can have such effect, it bars the plaintiff from a suit against either trespasser. But we are not aware that this result necessarily follows.

. . . . . .

The general rule, also, as stated in the case in Greenleaf, as to joint debtors, may well be applied in case of joint trespassers, viz., that nothing short of payment of damage by one of two joint trespassers, or a release under seal, can operate to discharge the other trespasser.

If so, a covenant not to sue Holt would avail nothing in defence to this action, and nothing short of payment by him for the damage sustained can discharge this defendant.

No release of damages was here given; and the only question is, whether the sum paid was in *satisfaction* of the damage incurred. If it was not so *received*, it is clear that the claim is not discharged.

The evidence is, that at the time of receiving the money from Holt, the plaintiff declared that he would not settle with Chandler for five hundred dollars. The substance of the arrangement betwixt the plaintiff and Holt seems to have been this: that the plaintiff was willing to receive a small portion of the damage from Holt, either for the reason that he conceived him to be less to blame than the defendant, or that he was less able to pay his proportion of the damage; and on condition of receiving this sum the plaintiff engaged to pursue the defendant for the remainder of his claim. It is clear that the sum paid was not received in *satisfaction* of the damage, but only in *part satisfaction;* and the fact that it was coupled with the engagement not to sue Holt does not alter the case. It is still but a partial satisfaction of the damage, and the plaintiff may sue or omit to sue whom he pleases, by contract or otherwise. The other trespasser has no equitable or legal claim to prevent such an arrangement. He remains liable for the whole damage, until satisfaction is made.

If the individual receiving the injury sees fit to *visit* the penalty upon any *one* guilty individual rather than another, such individual has no right to complain. It is part of the necessary liability that he incurs in committing the trespass, and should serve to deter him from such wrongful acts. At the same time, any partial payment by a co-trespasser avails so far for his benefit. Such was the ruling in this case. To this extent the defendant can avail himself of the plaintiff's arrangement with his co-trespasser, but there was nothing in that contract which constitutes a bar to this suit. There must, therefore, be

Judgment on the verdict against the defendant.

NUNN, J., IN LOUISVILLE, &c., COMPANY *v.* BARNES' ADM'R.

1904. 117 *Kentucky*, 860, pp. 870, 871.

NUNN, J. . . . We are unable to understand why a part satisfaction and release of one tort feasor can be considered as complete satisfaction of his claim for damages, and operate as a bar to his cause of action against the other tort feasors. There can be no good reason for this. The collection of a part satisfaction from one tort feasor is a benefit to the others. Under the law there is no right of contribution existing between tort feasors. The law does not look with favor upon wrong-doers, and they are unlike obligors in an ordinary contract, where the right of contribution is given. The law ought not to be that a release of one tort feasor, by his making a partial satisfaction for the wrong done, should operate as a release of the other wrong-doers. The law looks with favor upon compromises and settlements. It is not the intention of the law to force people into litigation and prevent settlements out of court. To uphold the rule contended for by appellant, such a result would follow. If ten persons commit a joint tort, and injure a person to the extent of $1000, and if nine of them recognize that fact, and were willing to pay $100 each for the purpose of remunerating the injured party and to avoid the expense and annoyance of litigation, and the tenth man refused to pay his $100, according to appellant the injured party could not accept the $900 in part satisfaction and sue the stubborn tenth man. He would plead the settlement as a satisfaction and a bar. Such a construction of the law would be unreasonable and unjust. All that such a person should be allowed to take advantage of would be to require that in any judgment that should be rendered against him it should be rendered for one satisfaction of the claim for damages, less any sums that might have been paid by his joint tort feasors as a partial satisfaction.

TAYLOR, J., IN ELLIS *v.* ESSON.

1880. 50 *Wisconsin*, 138, p. 154.

As was insisted by the learned counsel for the respondent, with great clearness and ability, there is no hardship in this rule. Certainly the receipt of a partial satisfaction from one of two joint tort feasors is no injury to the other who is afterwards sued for the trespass. On the other hand, it is to his benefit, as he has the advantage of what was paid by his associate in the wrong in reducing the judgment against him. The party injured is under no duty to the joint

wrong-doer to proceed at all against his associate, and his refusal to proceed against him is no ground of defence. As it is wholly optional with the injured party to proceed against one of two joint wrong-doers for the whole of his damages, there is no equity in holding that, because he has received a part satisfaction for his injury from the one not proceeded against, upon an agreement not to sue him for the wrong, the other may set up such receipt as a complete defence to the action. He is benefited and not injured by such proceeding. Again, suppose the injured party has obtained judgment against two wrong-doers: he is under no obligation to collect the damages equally of both; and if he should direct the execution to be levied and collected out of the property of one, he would have no redress, and no power to compel his co-defendant to contribute; or if the plaintiff in such case should direct the execution to be collected in part only out of the property of each, neither would have any right to control the amount which should be so collected of the other. And certainly such discretion could not be set up as a bar by either to the collection of the part directed to be collected of his property.

SECTION V.

Effect of Satisfied Judgment against One of the Joint Wrongdoers.

MORTON'S CASE.

26 *Elizabeth. Croke Elizabeth*, 30.

Trespass against Morton for entering into his house, and taking away his goods. The defendant pleadeth the trespass was done by him and J. S., and the plaintiff had brought trespass against J. S., and recovered against him, and had execution, and is satisfied, and demands judgment if he might impeach him, &c. And upon this it was demurred. — *Plowden* moved, that this was a good plea; for when a trespass is done by two, this is joint, and it is also several: so that if the party be satisfied by one, this is a discharge against the other; and the trespass is so joint, that if the plaintiff doth confess that the defendant and another did the trespass, the writ shall abate; for it ought to be brought against both. 8 Hen. 5, pl. 9; 2 Hen. 7, pl. 16; *Foster's case*, 21 Edw. 4; 22 Edw. 4. In 2 Rich. 3, a difference is taken between a trespass by two, and a felony by two: for a felony by two is always several; and a pardon of one is no discharge of the other.

Wray, C. J., conceived it reasonable, that the execution and satisfaction by one should discharge the other. — Gawdy, *contra:* For the trespass is always in itself several; and when the plaintiff hath recovered against one, and is satisfied for the damages he has done to him, this is nothing to the trespass done by the other: but a release to one is available to the other; for by the release he acknowledges himself satisfied. — Clench. If one command three to do a trespass, and they do it, and a recovery is had against him, and he being in execution doth satisfy the plaintiff, this is a good discharge of the others; for the commander was the principal trespasser, and the others did it but as his servants; which Gawdy seemed to agree, *et adjournatur.*

LIVINGSTON *v.* BISHOP.

1806. 1 *Johnson*, 290.[1]

The plaintiff brought separate actions of trespass against the defendant and five other persons, for a joint trespass. The defendant was

[1] Portions of the opinion are omitted. — Ed.

the principal trespasser; the other defendants acted as his servants. Pending the suits, and before trial of either of them, the counsel on both sides entered into a written agreement, that the defendant Bishop should, upon the trial of the cause against him, be considered as answerable for the whole trespass committed by all the defendants; and in case a verdict should be found against him, and this Court should be of opinion that the plaintiff would be entitled to costs in the other suits, after a trial and recovery against Bishop, as a joint trespasser, for the whole damages, then the other defendants were to pay the costs of their respective suits, otherwise not. The cause afterwards proceeded to trial, and a verdict was found against Bishop, the defendant; on which judgment was entered up, and an execution awarded, which has been paid and satisfied.

This case was submitted to the Court without argument.

KENT, C. J. On looking into the books, with a view to this question, I was surprised to meet with so much contradiction and uncertainty on the subject. The cases are not all capable of being reconciled to each other, and some of them appear to me not reconcilable with reason. It is, however, a proposition that is not controverted, but everywhere admitted, that for a joint trespass the plaintiff may sue all the trespassers jointly, or each of them separately, and that each is answerable for the act of all. It would seem to result from this doctrine that a trial and recovery against one trespasser is no bar to a trial and recovery against another. If there can be but one recovery, it is in vain to say that the plaintiff may bring separate suits, for the cause that happens to be first tried may be used by way of plea *puis darrein continuance*, to defeat the other actions that are in arrear. The more rational rule appears to be, that where you elect to bring separate actions for a joint trespass, you may have separate recoveries, and but one satisfaction; and that the plaintiff may elect *de melioribus damnis*, and issue his execution accordingly; and that where he has made this election, he is concluded by it, and that if he should afterwards proceed against the other defendants, they shall be relieved on payment of their costs. This is agreeable to the rule laid down in *Sir John Heydon's case*, 11 Co. 5, where, in trespass against several, one appeared and pleaded not guilty to a declaration against him, with a *simul cum*, &c., and afterwards another appeared and pleaded not guilty to a like declaration, whereupon separate *venires* issued, and the issues were separately tried, and separate and different damages assessed, and the Court resolved that the plaintiff had his election of the different damages assessed, which should bind all, and that there should be but one execution.

The case of *Brown* v. *Wotton*, Yelv. 67; Cro. Jac. 73; Moor, 762, stands, however, opposed to this view of the subject, and it merits some attention. That was an action of trover for certain goods, and the defendant pleaded a judgment and execution in behalf of the plaintiff, against one I. S. for the same goods, and the plea was held

good.[1] [The learned judge then criticised the decision in *Brown* v. *Wotton*; and cited authorities tending to show that the plea should have averred, not only judgment, but also satisfaction.]

I am therefore inclined to question the extent of the decision in *Brown* v. *Wotton*, and to hold that a recovery against one joint trespasser is not alone a bar to a suit against another. There must, at least, be an execution thereon to bring a case within the facts on which that decision was founded; and that, perhaps, may be deemed an election by the plaintiff, *de melioribus damnis*, and sufficient to conclude him. The trial and recovery in the present case was, therefore, no bar to the other suits which were pending, and I conclude that the plaintiff is entitled, under the agreement, to the costs of the other suits. In the analogous case of a recovery in separate suits against the drawer and indorser of a note, the costs of both suits were to be paid. *Windham* v. *Wither*, Str. 515. Our statute Laws, sect. 26, c. 90, s. 14, vol. i. 357, allows a recovery of costs in one of the suits only; but this statute was an alteration of the former law, and it does not apply to suits in trespass. The case of a *unica taxatio damnorum* is, where the trespassers are sued jointly, and they sever in their pleas, and separate damages are assessed; and the reason of this is, that in judgment of law, the several juries give but one verdict at one time. 10 Co. 117 a; 11 Co. 7 a. There is no case that I have met with that requires a single taxation of costs where there are separate suits in trespass, or that excludes the plaintiff from his costs in all the suits in this case, any more than in the case of separate suits on one obligation, antecedent to our statute. The fact annexed to the case, that execution had been issued, and satisfaction received of the judgment against Bishop, is not material, as the present question arises upon the agreement.

The opinion of the Court, accordingly, is, that the plaintiff is entitled to his costs in each of the suits, up to the time of the agreement, together with the costs of the present application.

THOMPSON, J., and TOMPKINS, J., concurred.

LIVINGSTON, J., and SPENCER, J., gave no opinion.

Rule granted.

[1] In the case of *Drake* v. *Mitchell and others*, 3 East's Rep. 258, Lord Ellenborough says, that a judgment alone is no bar until it be made productive in satisfaction to the party, and until then cannot operate to change any other collateral concurrent remedy which the party may have.

SECTION VI.

Effect of Unsatisfied Judgment against One of the Joint Wrong-doers.

LOVEJOY *v.* MURRAY.

1865. 3 *Wallace*, 1.[1]

Lovejoy brought suit in one of the Courts of Iowa against O. H. Pratt, and the sheriff attached certain personal property, which was assumed to be the property of Pratt. A certain Murray, however, claimed it as his. The sheriff, now in possession, was unwilling to proceed further in the attachment, or to sell the property under it, unless indemnified by Lovejoy & Co. These parties accordingly executed a bond, in which, reciting that the sheriff had attached and taken possession of the property, they bound themselves to pay all damages, &c. The sheriff then proceeded to sell the property under Lovejoy & Co.'s attachment, and under direction of their attorneys.

This being done, Murray sued the sheriff for an alleged trespass. The sheriff gave notice of this suit, as soon as brought, to Lovejoy & Co., and they defended it; counsel, whom they paid, having taken exclusive charge of it. In this suit, Murray obtained

Judgment against the sheriff for	$6233
Which the sheriff, without execution issued, satisfied to the extent of	830
Leaving a balance unsatisfied of	$5403

Murray then brought suit against Lovejoy & Co. for this same trespass; and the facts being agreed on in a case stated, the Court gave judgment for the plaintiffs for the amount of the judgment against the sheriff less the $830 paid by him.

On error here from the Massachusetts Circuit (where Lovejoy & Co. had been sued), three questions were made.

1. Did Lovejoy & Co., in giving the bond of indemnity to the sheriff, become thereby liable as joint trespassers with him in what was done under the attachment?

2. Did Murray, by suing the sheriff alone, and getting partial satisfaction of the judgment against that officer, bar himself of a right to sue Lovejoy & Co. for the same trespass?

3. Was Murray's judgment against the sheriff conclusive against Lovejoy & Co. in this suit against them?

[1] Only so much of the case is given as relates to a single question. Only portions of the opinion are given. The arguments are omitted. — Ed.

The case was thoroughly argued on both sides, in this Court, on the authorities, ancient and modern, English and our own.

Mr. Hutchins, for plaintiffs in error.

Mr. Ball, *contra*.

MILLER, J. The record before us raises three questions, all of which depend upon the principles of the common law exclusively for their solution.

[Omitting the opinion on the first question.]

2. Did the plaintiff, by suing Hayden, the sheriff, alone, recovering judgment for about six thousand dollars, and receiving from him eight hundred and thirty dollars on the said judgment, thereby preclude himself from maintaining this suit against these defendants for the same trespass? Is the judgment, or the judgment and part payment, in that case a bar to this action?

Parke, Baron, in the case of *King* v. *Hoare*, 13 Meeson & Welsby, 502, speaking in reference to the same proposition in its application to actions on joint contracts, says, in 1846, that it is remarkable that the question should never have been decided in England. It is equally remarkable that the proposition here presented should be an open question at this day.

The faithful and exhausting research of counsel, in this case, shows that there are conflicting authorities, not only on the main proposition, but on several incidental and collateral points closely connected with it. Two propositions, however, seem to be conceded by all the authorities, which bear with more or less force on the main question, and which may as well be stated here.

1. That persons engaged in committing the same trespass are joint and several trespassers, and not joint trespassers exclusively. Like persons liable on a joint and several contract, they may be all sued in one action; or one may be sued alone, and cannot plead the nonjoinder of the others in abatement; and so far is the doctrine of several liability carried, that the defendants, where more than one are sued in the same action, may sever in their pleas, and the jury may find several verdicts, and on several verdicts of guilty may assess different sums as damages.

2. That no matter how many judgments may be obtained for the same trespass, or what the varying amounts of those judgments, the acceptance of satisfaction of any one of them by the plaintiff is a satisfaction of all the others, except the costs, and is a bar to any other action for the same cause.

. . . . . .

[After an elaborate examination of authorities the opinion proceeds.]

If we turn from this examination of adjudged cases, which largely preponderate in favor of the doctrine that a judgment, without satisfaction, is no bar, to look at the question in the light of reason, that doctrine commends itself to us still more strongly. The whole theory of the opposite view is based upon technical, artificial, and unsatisfactory reasoning.

We have already stated the only two principles upon which it rests. We apprehend that no sound jurist would attempt at this day to defend it solely on the ground of *transit in rem judicatam.* For while this principle, as that other rule that no man shall be twice vexed for the same cause of action, may well be applied in the case of a second suit against the same trespasser, we do not perceive its force when applied to a suit brought for the first time against another trespasser in the same matter.

In reference to the doctrine that the judgment alone vests the title of the property converted, in the defendant, we have seen that it is not sustained by the weight of authorities in this country. It is equally incapable of being maintained on principle.

The property which was mine has been taken from me by fraud or violence. In order to procure redress, I must sue the wrongdoer in a Court of law. But, instead of getting justice or remedy, I am told that by the very act of obtaining a judgment — a decision that I am entitled to the relief I ask — the property, which before was mine, has become that of the man who did me the wrong. In other words, the law, without having given me satisfaction for my wrong, takes from me that which was mine, and gives it to the wrongdoer. It is sufficient to state the proposition to show its injustice.

It is said that the judgment represents the price of the property, and as plaintiff has the judgment, the defendant should have the property. But if the judgment does represent the price of the goods, does it follow that the defendant shall have the property before he has paid that price? The payment of the price and the transfer of the property are, in the ordinary contract of sale, concurrent acts. 2 Kent, 388-389; Greenleaf on Evidence, § 533; *Hyde* v. *Noble*, 13 New Hampshire, 500; *Hepburn* v. *Sewell*, 5 Harris & Johnson, 211.

But in all such cases, what has the defendant in such second suit done to discharge himself from the obligation which the law imposes upon him, to make compensation? His liability must remain, in morals and on principle, until he does this. The judgment against his co-trespasser does not affect him so as to release him on any equitable consideration. It may be said that neither does the satisfaction by his co-trespasser, or a release to his co-trespasser do this; and that is true. But when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages. But it is not easy to see how he is so affected, until he has received full satisfaction, or that which the law must consider as such.

We are, therefore, of opinion that nothing short of satisfaction, or its equivalent, can make good a plea of former judgment in trespass, offered as a bar in an action against another joint trespasser, who was party to the first judgment.

The second question must, therefore, be answered in the negative.

[Omitting opinion on the third question.] *Judgment affirmed.*[1]

1 For the English doctrine, see *Brinsmead* v. *Harrison*, L. R. 7 Com. Pleas, 547. — Ed.

SECTION VII.

Contribution and Indemnity as between Wrong-doers.

MERRYWEATHER *v.* NIXAN.

39 *Geo.* 3d. 8 *Durnford & East*, 186.

One Starkey brought an action on the case against the present plaintiff and defendant for an injury done by them to his reversionary estate in a mill, in which was included a count in trover for the machinery belonging to the mill; and having recovered 840*l.* he levied the whole on the present plaintiff, who thereupon brought this action against the defendant for a contribution of a moiety, as for so much money paid to his use.

At the trial before Mr. Baron Thomson at the last York assizes the plaintiff was nonsuited, the learned judge being of opinion that no contribution could by law be claimed as between joint wrong-doers; and consequently this action upon an implied assumpsit could not be maintained on the mere ground that the plaintiff had alone paid the money which had been recovered against him and the other defendant in that action.

Chambre now moved to set aside the nonsuit; contending that, as the former plaintiff had recovered against both these parties, both of them ought to contribute to pay the damages. But

Lord Kenyon, Ch. J., said there could be no doubt but that the nonsuit was proper; that he had never before heard of such an action having been brought where the former recovery was for a tort. That the distinction was clear between this case and that of a joint judgment against several defendants in an action of assumpsit. And that this decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right.

Rule refused.

The case of *Philips* v. *Biggs*, Hardr. 164, was mentioned by *Law*, for the defendant, as the only case to be found in the books in which the point had been raised: but it did not appear what was ultimately done upon it.

ADAMSON *v.* JARVIS.

1827. 4 *Bingham*, 66.[1]

Best, C. J A motion has been made in arrest of judgment *after verdict*. The plaintiff relies on the second count, on which only his verdict and judgment are to be entered.

Stripped of the technical language with which it is encumbered, the case stated on the second count is this: that the defendant having property of great value in his *possession*, represented to the plaintiff that he had authority to dispose of such property; and followed this representation by a request that the plaintiff would sell the property for him, the defendant. The plaintiff, believing the representation of the defendant as to his right to the property, and not knowing, either at the time the representation was made, or at any time after, that it was not his, as the agent of the defendant, sold the property; and after paying such sums out of the proceeds as he was bound to pay, and making such deductions as he had a right to make, and which the defendant appears to have allowed, paid the residue to the defendant.

The defendant, who had induced the plaintiff to make this sale by his false representation and request to sell, and who, after the sale, continued to assert his right to sell, and confirmed the agency of the plaintiff by accepting from him the residue of the proceeds of the sale, had no right to dispose of this property. The consequence has been, that the plaintiff, supposing, from the defendant's false representations, he had an authority which he had not, and, acting as the defendant's agent, has rendered himself liable to an action at the suit of the true owner of the goods, and has been obliged to pay damages and costs, whilst the defendant, the sole cause of the sale, quietly keeps the fruits of it in his pocket.

It has been stated at the bar that this case is to be governed by the principles that regulate all laws of principal and agent: — agreed: every man who employs another to do an act which the employer appears to have a right to authorize him to do undertakes to indemnify him for all such acts as would *be lawful* if the employer had the authority he pretends to have. A contrary doctrine would create great alarm.

Auctioneers, brokers, factors, and agents, do not take regular indemnities. These would be indeed surprised, if, having sold goods for a man and paid him the proceeds, and having suffered afterwards in an action at the suit of the true owners, they were to find themselves wrong-doers, and could not recover compensation from him who had induced them to do the wrong.

It was certainly decided in *Merryweather* v. *Nixan*, 3 T. R. 186, that

[1] Statement and arguments omitted; also part of opinion. — Ed.

one wrong-doer could not sue another for contribution; Lord Kenyon, however, said, "that the decision would not affect cases of *indemnity*, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right." This is the only decided case on the subject that is *intelligible*.

There is a case of *Walton* v. *Hanbury and others*, 2 Vern. 592, but it is so imperfectly stated, that it is impossible to get at the principle of the judgment.

The case of *Philips* v. *Biggs*, Hardr. 164, was never decided; but the Court of Chancery seemed to consider the case of two sheriffs of *Middlesex*, where one had paid the damages *in an action for an escape, and sued the other for contribution, as like the case of two joint obligors.*

From the inclination of the court on this last case, and from the concluding part of Lord Kenyon's judgment in *Merryweather* v. *Nixan*, and from reason, justice, and sound policy, the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act.

If a man buys the goods of another from a person who has no authority to sell them, he is a wrong-doer to the person whose goods he takes; yet he may recover compensation against the person who sold the goods to him, although the person who sold them did not undertake that he had a right to sell, and did not know that he had no right to sell. This is proved by *Medina* v. *Stoughton*, 1 Salk. 210; *Sanders* v. *Powel*, 1 Lev. 129; *Crosse* v. *Gardner*, Carth. 90, 1 Roll. Abr. 91, l. 5, and many other cases.

These cases rest on this principle, that if a man, having the possession of property which gives him the character of owner, affirms that he is owner, and thereby induces a man to buy, when in point of fact the affirmant is not the owner, he is liable to an action.

It has been said, that is because there is a breach of *contract* to rest the action on, and that there is no contract in this case. This is not the true principle: it is this; he who affirms either *what he does not know to be true*, or knows to be false, to another's prejudice and his own gain, is both in morality and law guilty of falsehood, and must answer in damages.

But here *is* a contract: the plaintiff is hired by defendant to sell, which implies a warranty to indemnify against all the consequences that follow the sale.

The above-cited cases show that a *scienter* is not necessary in this case, although it was necessary in the case of *Haycraft* v. *Creasy* and the cases of that class. In these cases, a party who had no interest was applied to for his opinion; if he gave an honest, although mistaken one, it was all that could be expected.

[Remainder of opinion omitted.]

Rule discharged.

CHURCHILL *v.* HOLT.

1879. 127 *Massachusetts*, 165.

MORTON, J. The plaintiffs were the lessees and occupants of a building on Winter Street, a crowded thoroughfare in the city of Boston. Connected with the building there was a hatchway in the sidewalk, leading into the basement. On March 31, 1875, one Julia Meston, a traveller upon the street, fell into the hatchway, which had been left open and unguarded, and was injured. She brought an action against these plaintiffs, alleging that she was injured by reason of their negligence in keeping the covering of the hatchway in an insecure condition, in allowing it to decay and become ruinous, and in allowing the hatchway to be uncovered, in which action she recovered a judgment for damages. The plaintiffs have brought this action to recover the amount of such judgment paid by them, on the ground that the hatchway was left uncovered, thus rendering the street dangerous, by the negligent and wrongful act of a servant of the defendants.

One ground taken by the defendants in this action is, that the injury was caused by the joint negligence of the plaintiffs and defendants, that they were joint tort feasors, and, therefore, that there is no right to indemnity or contribution between them. This subject was considered in the recent case of *Gray* v. *Boston Gas Light Co.*, 114 Mass. 149, and the decision in that case covers the questions raised in the case at bar. As there stated, the rule that one of two joint tort feasors cannot maintain an action against the other for indemnity or contribution, does not apply to a case where one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability; in such case, the parties are not *in pari delicto* as to each other, though as to third persons either may be held liable. In the case at bar, it was not negligent or wrongful for the plaintiffs to have a suitable hatchway extending into the sidewalk, or to open it at proper times, taking care to provide barriers or other warnings to prevent danger to travellers on the street. The negligence which made them liable to the person injured was, that they allowed the hatchway to remain open without proper barriers or other warning. As lessees and occupants of the building, it was their duty, as between themselves and the public, to keep the hatchway in such proper and safe condition that travellers on the street would not be injured. If they neglected this duty, they would be liable, although the unsafe condition was caused by a stranger, and although they did not know it. Their liability depended upon the question whether the hatchway was dangerous to travellers under such circumstances that the occupant of the building was responsible for the injury suffered, and not upon the question as to who negligently did the act which created the danger.

If the defendants, or a servant in the prosecution of their business, negligently uncovered the hatchway and allowed it to remain unguarded, without the knowledge of the plaintiffs, whereby the plaintiffs from their relation to the building were made liable to the person injured, the rule as to joint tort feasors does not apply, but the plaintiffs can maintain this action.

The ground taken by the defendants, that the judgment in the suit by Meston against the plaintiffs is conclusive against the right to maintain this action, cannot be sustained.

Under the pleadings in that suit, the judgment may have been rendered upon the ground that the plaintiffs were liable as occupants of the building, without any regard to the question whether they or a stranger to the suit removed the cover, or negligently left it unguarded. It conclusively shows that they were guilty of negligence in law as to the person injured, but it does not show that they were *participes criminis* with the defendants, and is not inconsistent with their right to maintain this action.

At the trial, the plaintiffs offered evidence tending to show that, on the day when the accident happened, they left the hatchway in a reasonably safe condition; that a servant of the defendants in the course of their business, without the knowledge of the plaintiffs, removed the cover, and left without replacing it or providing any barrier or warning; and that, while it was thus open, Mrs. Meston fell in and was injured.

We are of opinion that the evidence should have been submitted to the jury. *Case to stand for trial.*

C. R. Train & J. O. Teele, for the plaintiffs.

A. A. Ranney, for the defendants.[1]

WOOLEY *v.* BATTE.

1826. 2 *Carrington & Payne*, 417.

Stafford Assizes. *Civil Side.* Before Mr. Justice Park.

Assumpsit for contribution. Plea — General issue. The plaintiff and defendant were joint proprietors of a stage coach; and damages had been recovered in an action *on the case*, against the former *only*, for an injury done to Mrs. Jeavons, a passenger, by reason of the negligence of the coachman. The plaintiff had paid the whole of the damages and costs, and brought the present action to recover half the amount from the defendant as his partner.

For the plaintiff, an examined copy of the judgment against him at the suit of the husband of Mrs. Jeavons, was put in. The declaration

[1] See *Same Case*, 131 Mass. 67. — Ed.

was in case, and stated the injury to have arisen from the negligence of the present plaintiff and his servants (in the usual form). It was also proved, that the plaintiff paid the amount of damages and costs in that action, amounting to 176*l.*, under an execution; that the plaintiff and the defendant were partners in the stage coach; and that the plaintiff *was not personally present* when the accident happened.

Jervis, for the defendant, contended, that as the action brought against the plaintiff was an action on the case for negligence, the plaintiff and defendant were joint tort feasors; and, therefore, one only being sued, he could not recover contribution from the other; and he cited *Merryweather* v. *Nixan*.

Campbell, for the plaintiff. No doubt the case of *Merryweather* v. *Nixan* is good law, and one tort feasor sued alone cannot recover contribution from another, who was a joint tort feasor with him; but here it is proved, that there was no personal fault in the plaintiff. The declaration of Jeavons against the present plaintiff might, with equal propriety, have been in *assumpsit;* in which case, the present plaintiff might clearly have recovered contribution; and it can hardly be contended, that the plaintiff should be deprived of his contribution by Mr. Jeavons's pleader drawing his declaration in one form instead of another.

Park, J. I think the plaintiff is entitled to recover.

Verdict for the plaintiff. — Damages, 88*l.*

Campbell & Russell, for the plaintiff.

Jervis, for the defendant.

ARMSTRONG COUNTY *v.* CLARION COUNTY.

1870. 66 *Pennsylvania State*, 218.[1]

Read, J. The bridge across Red Bank Creek, between the counties of Armstrong and Clarion, at the place known as the Rockport Mills, was a county bridge, maintained and kept in repair at the joint and equal charge of both counties. Whilst John A. Humphreys was crossing the bridge it fell and he was severely injured; he brought suit for damages against the county of Armstrong; and on the trial, under the charge of the court, there was a verdict for defendant. This was reversed on writ of error (6 P. F. Smith, 204); and upon a second trial there was a verdict for the plaintiff for $1100 damages, on which judgment was entered. This judgment, with interest and costs, was paid by Armstrong County, and the present suit is to recover contribution from Clarion County. On the trial the learned judge nonsuited the

[1] Statement and arguments omitted; also part of opinion. — Ed.

plaintiff on the ground that one of two joint wrong-doers cannot have contribution from the other.

The commissioners of the two counties had examined the bridge in the summer and ordered some repairs which were made. There can be little doubt that morally Clarion County was bound to pay one half of the sum recovered from and paid by Armstrong County; and the question is, does not the law make the moral obligation a legal one?

[After citing cases where contribution was refused.]

In Story on Partnership, sect. 220, after speaking of the general rule that there is no contribution between joint wrong-doers, the author says: "But the rule is to be understood according to its true sense and meaning, which is, where the tort is a known meditated wrong, and not where the party is acting under the supposition of the entire innocence and propriety of the act, and the tort is merely one by construction, or inference of law. In the latter case, although not in the former, there may be and properly is, a contribution allowed by law for such payments and expenses between constructive wrong-doers, whether partners or not."

[After citing *Adamson* v. *Jarvis*, *Wooley* v. *Batte*, and other cases where contribution was allowed.]

These cases have been followed in this court in *Horbach's Administrators* v. *Elder*, 6 Harris, 33. "Here," said Judge Coulter, "the plaintiff and defendant are *in equali jure*. The plaintiff has exclusively borne the burden which ought to have been shared by the defendant, who therefore ought to contribute his share."

"Contribution," says Lord Chief Baron Eyre, in *Dering* v. *Earl of Winchelsea*, 1 Cox, 318, "is bottomed and fixed on general principles of natural justice, and does not spring from contract."

These principles rule the case before us. The parties plaintiff and defendant are two municipal corporations, jointly bound to keep this bridge in repair. These bodies can act only by their legally constituted agents, their commissioners, who examine the structure and order repair which is done. They erred in judgment, and both were liable for the consequences of that error, and one having paid the whole of the damages is entitled to contribution from the other.

Judgment reversed, and *venire de novo* awarded.

MITCHELL, J., IN ANKENY v. MOFFETT.

1887. 37 *Minnesota*, 109, pp. 110, 111.

MITCHELL, J. Defendant Moffett and one Johnson, being severally the owners of two adjoining lots, joined in erecting a building upon them, and united in letting the contract for its construction to one

builder. While the building was in process of erection, a portion of its walls fell, and injured one Walters, who thereupon sued Moffett and Johnson for damages, and recovered a joint judgment against the two. They were not guilty of any intentional wrong, or of any bad faith, or of any act in itself illegal, and hence the ground of their liability to Walters must have been mere negligence in the manner of erecting the building. After the rendition of the judgment, Moffett, being threatened with execution, but no levy having been made on his property, paid the entire judgment, filed his notice of payment and claim to contribution as required by statute, and then caused execution to be issued for one half of the amount of the judgment, and levied on the property of Johnson. Johnson subsequently made an assignment for the benefit of creditors to plaintiff, who brings this action to enjoin the sale on the execution.

The whole case turns upon the construction of the statute relating to contribution and subrogation between joint judgment debtors (Gen. St. 1878, c. 66, § 330). That in this case Moffett is entitled to contribution from Johnson cannot be doubted. Whether the statute cited was intended to change the rule that there can be no contribution among wrong-doers it is unnecessary to consider. That rule is applicable only where the person seeking the contribution was guilty of an intentional wrong, or, at least, where he must be presumed to have known that he was doing an illegal act. It is immaterial whether the ground of Walter's recovery was the negligence of Moffett and Johnson personally, or that of their agent, the builder. In neither one was there any intentional wrong. In the one case it would be mere negligence in doing a lawful act; in the other case there would be no personal fault whatever on their part. In neither case would the rule apply. Cooley, Torts, 144–147; *Adamson* v. *Jarvis*, 4 Bing. 66; *Bailey* v. *Bussing*, 28 Conn. 455; *Wooley* v. *Batte*, 2 Car. & P. 417; *Horbach* v. *Elder*, 18 Pa. St. 33; *Armstrong Co.* v. *Clarion Co.*, 66 Pa. St. 218; *Nickerson* v. *Wheeler*, 118 Mass. 295.[1]

PALMER *v.* WICK, &c., STEAM SHIPPING COMPANY.

1894. *L. R.* (1894) *Appeal Cases*, 318.[2]

Appeal against a judgment of the Second Division of the Court of Session, Scotland.

Action by the Shipping Company against Palmer, a stevedore, for payment of half the sum previously awarded jointly and severally against the Shipping Company and Palmer as damages for the death

[1] But see *Churchill* v. *Holt*, 131 Mass. 67. — Ed..

[2] Statement rewritten. Arguments omitted: also portions of opinions. — Ed.

of a workman, Fowlis, engaged by Palmer in unloading the company's ship; also for payment of half the costs awarded in the same terms. These sums the company had paid in full and had taken an assignation to the decrees [judgments].

The family of the deceased brought separate actions against the company and against Palmer. Fowlis was killed by the fall of a block, which formed part of the ship's tackle used in unloading. In the action against the company, the plaintiffs alleged negligence in supplying defective tackle. In the action against Palmer they alleged recklessness in the manner of using the tackle.

The cases were sent to trial together. The jury found against each of the defenders that the death was due to their fault; and the jury assessed the total damage sustained by the pursuers at £600. The court applied the verdict, by discerning against the parties to the present appeal, jointly and severally, for the full amount of the damages fixed by the jury, and found the pursuers entitled to expenses in both actions. These were subsequently taxed at £237 19*s.* 9*d.*, for which sum also the pursuers obtained a joint and several decree. They extracted both decrees, and gave a charge to the respondent company, who paid their demands in full, and took an assignation to the decrees. The appellant having declined to relieve them of any part of the sums thus paid by them, the company brought this action, in which they ask decree against him for a moiety of these sums.

The Second Division decreed for plaintiff company. Palmer appealed.

Sir R. Webster, Q. C., and *T. Shaw* (now Solicitor-General for Scotland), for appellant.

The Solicitor-General for Scotland (*Asher, Q. C.*), and *Salvesen* (of the Scotch bar), (with them *T. F. Dawson Miller*), for respondents.

Lord Herschell, L. C. . . . My Lords, we have before us in the present action only the pleadings and verdict in the conjoined actions. It is at least consistent with these that the jury may have found their verdict of negligence against the shipping company, not on the ground of any personal default on the part of the company or its managers, but by reason of some negligence imputable to the master of the vessel. It is important to bear this in mind.

. . . . . .

There can be no doubt that the decrees of the 17th of March and 24th of May created joint and several debts. Why, then, should a co-debtor, who has paid the entire sum due, and received an assignation (it is unnecessary to inquire whether he could have demanded it), when he seeks to recover the share of his co-debtor, be subject more than other co-obligants to the answer that, the entire debt having been discharged, nothing remains due on the judgment, and that it can, therefore, no longer be proceeded on? The only answer, as it seems to me, must be that the joint debt resulted from a joint wrong, and that the law will not permit or assist any wrong-doer to recover con-

tribution from another. It will be observed, however, that this is to allow the defender to set up his own wrong by way of answer, for the pursuer makes out a *prima facie* case by the production of the judgment and assignation. He has no need to rely on the joint wrong, or to go behind the judgment and assignation. On principle I can see no reason why, when a joint judgment debt has resulted from a joint wrong, each co-debtor should not pay his share; or why, if one be compelled by the creditor to pay the whole debt, the other should be enabled to go free by setting up his own wrong. Suppose a settlement were arrived at before the case was tried, and the wrong-doers gave a joint and several bond in discharge of the pursuer's claim, can it be doubted that, if one of them were forced to pay the whole, he could recover from the other his share? Why should the case be different where the issue is a decree that they shall jointly and severally pay? The learned judges in the Inner House, differing from the Lord Ordinary, have decided in favor of the pursuers in the present action. I am not disposed to dissent from their conclusion unless it can be clearly shown to be contrary to the established law of Scotland.

. . . . . .

It is not necessary in this appeal to decide whether there can be any right to contribution in the case of a delict proper when the liability has arisen from a conscious and therefore moral wrong, nor even whether in every case of *quasi-delict* a delinquent may obtain relief against his co-delinquent, though I see, as at present advised, no reason to differ from the opinion, which I gather my noble and learned friend Lord Watson holds, that such a right may exist. In circumstances such as those with which your Lordships have to deal, I cannot but think that equity and justice are in favor of the conclusion arrived at by the Inner House, and there seems to be no authority compelling a contrary decision. It was urged that the person seeking relief might be the more culpable of the delinquents; but it is just as likely that he should be the less culpable. In selecting from which of his co-debtors he will obtain payment, the creditor would be guided usually by considerations wholly independent of the relative culpability of those from whom he may recover it.

Much reliance was placed by the learned counsel for the appellant upon the judgment in the English case of *Merryweather* v. *Nixan*, 8 T. R. 186. The reasons to be found in Lord Kenyon's judgment, so far as reported, are somewhat meagre, and the statement of the facts of the case is not less so. It is now too late to question that decision in this country; but when I am asked to hold it to be part of the law of Scotland, I am bound to say that it does not appear to me to be founded on any principle of justice or equity, or even of public policy, which justifies its extension to the jurisprudence of other countries. There has certainly been a tendency to limit its application even in England. In the case of *Adamson* v. *Jarvis*, 4 Bing. 66, Best, C. J., in delivering the judgment of the court, referred to the case of *Philips* v. *Biggs*,

Hard. 164, which he said was never decided; "but the Court of Chancery seemed to consider the case of two sheriffs of Middlesex, where one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint obligors." He then proceeded as follows: "From the inclination of the court in this last case, and from the concluding part of Lord Kenyon's judgment in *Merryweather* v. *Nixan*, 8 T. R. 186, and from reason, justice, and sound policy, the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." If the view thus expressed by the Court of Common Pleas be correct (and I see no reason to dissent from it), the doctrine that one tort feasor cannot recover from another is inapplicable to a case like that now under consideration.

For these reasons I move your Lordships that the interlocutor appealed from be affirmed, and the appeal dismissed with costs.

Lord Watson. . . . At the Bar of the House, the appellant mainly relied on the proposition, which he endeavored to establish by authority, that, by the law of Scotland, there can be no right of contribution among persons who are jointly responsible for the civil consequences of any delict or quasi-delict. Delicts proper embrace all breaches of the law which expose their perpetrator to criminal punishment. The term quasi-delict is generally applied to any violation of the common or statute law, which does not infer criminal consequences, and does not consist in the breach of any contract, express or implied. Cases may and do often occur in which it is exceedingly difficult to draw the line between delicts and quasi-delicts. The latter class, as it has been developed in the course of the present century, covers a great variety of acts and omissions, ranging from deliberate breaches of the law, closely bordering upon crime, to breaches comparatively venial and involving no moral delinquency.

In considering the authorities which were cited on both sides of the Bar, as bearing more or less directly upon the present case, it is necessary to distinguish between these two points: (1) The right of the party injured to select any one or more of the co-delinquents, and to exact full reparation from him or them, without making the rest parties to the suit; and (2) the right, if any, of the co-delinquent who pays to recover a contribution from those persons who were under the same responsibility as himself.

[After reviewing the Scotch authorities.]

From these authorities, which are to some extent conflicting and in other respects are not so definite as one could wish, I think the following conclusions may be derived. They are at variance in so far as they directly relate to the existence or non-existence of a right of relief among those persons who have incurred civil liability by acting together in the perpetration of an offence against the criminal law. But it does not appear to me that the dicta of those writers who nega-

tive the existence of such a right can be held to contemplate every case of quasi-delict, whatever be its nature. They *prima facie* refer to proper delicts, and might *ex paritate rationis* be extended to every quasi-delict which, according to the phraseology of Scotch law, *sapit naturam delicti;* but they cannot, in my opinion, be fairly read as referring to quasi-delicts which involve no moral offence on the part of the delinquent. The opinions expressed by Lord President Inglis, and more recently by Lord Shand, point strongly to that interpretation. These opinions refer, no doubt, to persons who in their trust capacity have been guilty of acts or omissions injurious to the estate under their charge and amounting to quasi-delict; but it is obvious that the exception which they suggest cannot be founded on the circumstance that the co-delinquents were trustees, but must rest on the principle that a right of relief exists and is available to a co-delinquent whose acts or omissions are not tainted with fraud or other moral delinquency.

I do not find it necessary for the purposes of this appeal to determine whether and how far the doctrine of Bankton and Kames, or that laid down by Baron Hume, ought to be accepted. I have already indicated my opinion that the circumstances of this case bring the respondent company within the scope of the principle just stated, which I do not hesitate to affirm upon its own merits, whether it be regarded as an exception from the general rule or not. There is weighty and recent authority in its favor, there is no tangible authority against it, and it appears to me to be founded on substantial considerations of equity.

Owing to the novelty of the questions which it involves, I have been led to discuss this branch of the case with, it may be, unnecessary detail. But I desire also to rest my decision upon another and in some respects a broader ground, which is very shortly and forcibly stated in the judgment of Lord Rutherfurd Clark. This is not an action brought by one delinquent against whom decree has passed in order to obtain contribution from his co-delinquent who has not been sued. The respondent company do not require to allege and prove either delict or quasi-delict as the foundation of their claim, which rests upon a decree constituting a civil debt against the appellant as well as against themselves. There might be some principle in a court of law refusing to permit a suitor to aver and prove his own crime or moral delinquency as the medium of recovering from one whom he alleges to have been a co-delinquent. But the case is very different where the injured party's claim of damage is liquidated by a joint and several decree against all the delinquents. In that case — which is the present case — the sum decreed is simply a civil debt, and the meaning which the law attaches to a decree constituting a debt in these terms is, that each debtor under the decree is liable *in solidum* to the pursuer, and that *inter se* each is liable only *pro rata*, or, in other words, for an equal share with the rest. In this case it is the appellant

who seeks to escape from the natural import of the decree, by going behind it in order to establish his own co-delinquency.

It was urged for the appellant that, seeing it is impossible to determine the exact proportion of the total damage attributable to the fault of each debtor, the whole loss must fall upon the debtor against whom the creditor chooses to enforce the decree, otherwise contributors might have to pay in excess of their real share. I cannot appreciate the force of that reasoning. The creditor is not bound to recover the whole from one; he may take it from all in what proportions he chooses; but that right of selection is not given to him in order that he may assess the damage due by each, but for his own convenience and in order that he may get in his money with the least possible trouble. And I fail to see how any inequality in contribution, such as the appellant suggested, could be redressed by the adoption of a rule which would practically leave it to the creditor to determine whether his damages should be borne by one or more or all of the debtors, and if by all in what proportions. The result of the rule, in many cases, would be that the whole loss would fall upon the debtor who had the least share in causing the injury.

I have not hitherto noticed the English case of *Merryweather* v. *Nixan*, 8 T. R. 186. Assuming it to be an authority establishing the general rule for which the appellant contends — a proposition which seems to admit of doubt — I can only regard it as a positive rule of the common law of England, which is inconsistent with, and ought not to override, the law and practice of Scotland. The merits of the rule are not, in my opinion, such as to commend it to universal acceptation.

For these reasons I am of opinion that the interlocutor appealed from is right and ought to be affirmed with costs.

Lord Halsbury. I concur with the proposition that the case of *Merryweather* v. *Nixan*, Ibid. has been so long and so universally acknowledged as part of the English law that even if one's own judgment did not concur with its principle it would be now too late to question its applicability to all cases in England governed by the principle therein enunciated; but I am not prepared to differ from the views entertained by the Lord Chancellor and my noble and learned friend Lord Watson when dealing with the jurisprudence of Scotland.

The difficulty which has arisen is, I think, one of words. The word "tort" in English law is not always used with strict logical precision. The same act may sometimes be treated as a breach of contract and sometimes as a tort. But "tort" in its strictest meaning, as it seems to me, ought to exclude the right of contribution which would imply a presumed contract to subscribe towards the commission of a wrong. It seems to me, therefore, that the distinction between classes of torts or quasi-delicts and delicts proper is reasonable and just, though I doubt whether in dealing with an English case one would be at liberty to adopt such a distinction. It becomes unnecessary to consider the form of the suit; but I think that in England the transmutation of

the cause of action into a judgment would not prevent the application of the principle of *Merryweather* v. *Nixan*, Ibid.

[LORD SHAND concurred.]

Interlocutor appealed from affirmed, and appeal dismissed with costs.[1]

[1] "Defendants in a judgment founded on an action for the redress of a private wrong shall be subject to contribution, and all other consequences of such judgment, in the same manner and to the same extent as defendants in a judgment in an action founded on contract." — Vol. i, Revised Statutes of Missouri, A. D. 1889, chapter 49, section 4431, page 1014.

As to the interpretation of this statute (originally enacted in 1855), see *Brewster* v. *Gauss*, 37 Missouri, 518; *Paddock-Hawley Iron Co.* v. *Rice*, 179 Missouri, 480; *Eaton & Prince Co.* v. *Mississippi Valley Trust Co.*, 123 Missouri Appeal Reports, 117.

In *City of Fort Scott* v. *Kansas City, &c., R. R. Co.*, 66 Kansas, 610, it was *held*, that section 480 of the Kansas Code of Civil Procedure authorizes a suit for contribution between joint judgment debtors, even where the judgment was rendered in an action founded upon a tort.

As to suit to enforce contribution in admiralty, see *The Mariska*, 107 Fed. Rep. 989. — ED.